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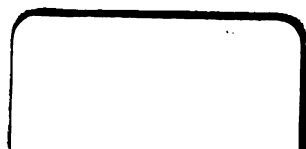
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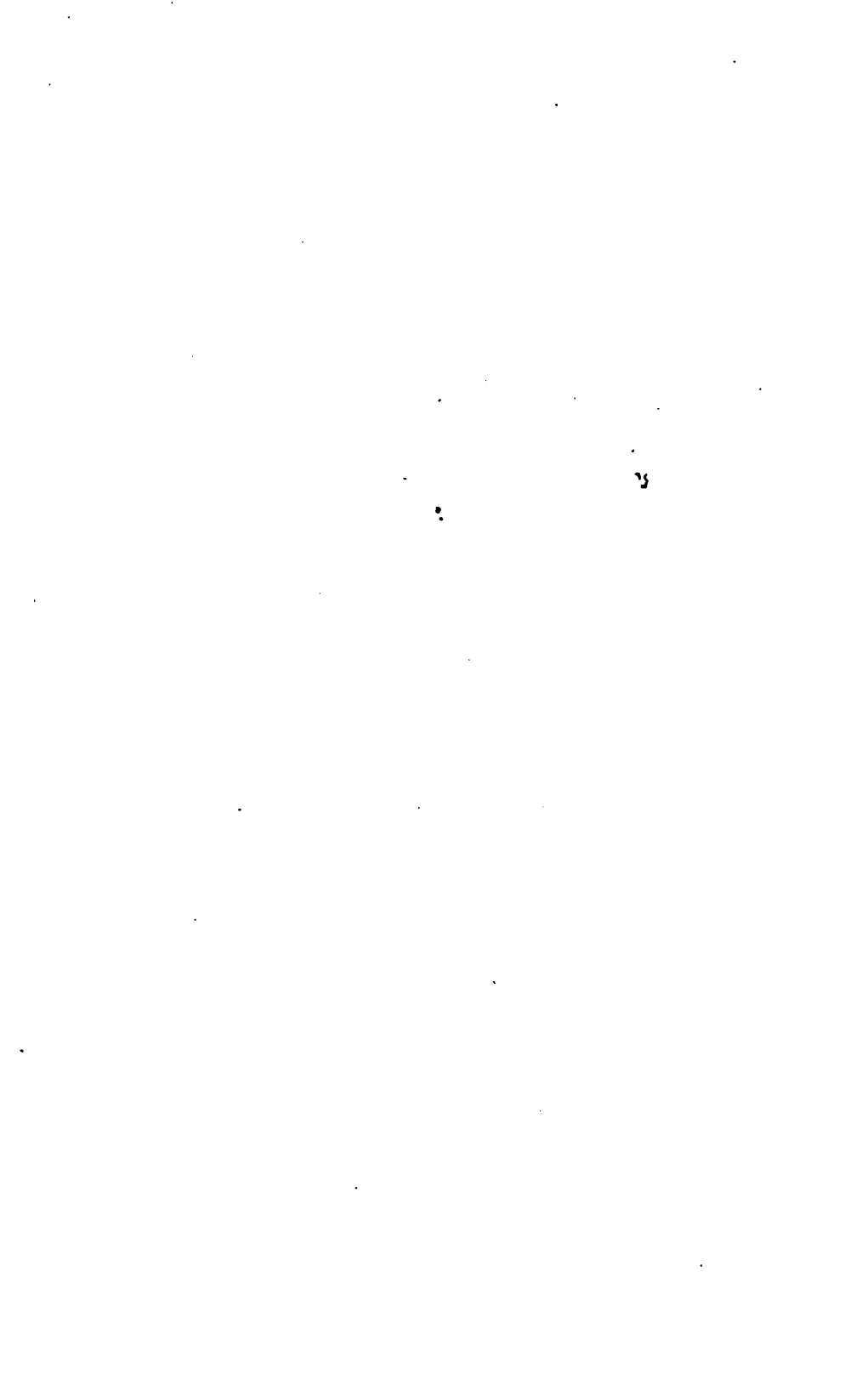
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THE
1880
ONTARIO REPORTS,
VOLUME VI.

CONTAINING
REPORTS OF CASES DECIDED IN THE QUEEN'S
BENCH, CHANCERY, AND COMMON
PLEAS DIVISIONS,
OF THE
HIGH COURT OF JUSTICE FOR ONTARIO

WITH A TABLE OF THE NAMES OF CASES ARGUED.
A TABLE OF THE NAMES OF CASES CITED,
AND A DIGEST OF THE PRINCIPAL MATTERS.

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DECIDED IN THE

QUEEN'S BENCH, CHANCERY, AND COMMON
PLEAS DIVISIONS.

OF THE

HIGH COURT OF JUSTICE FOR ONTARIO.

[CHANCERY DIVISION.]

MAKINS V. ROBINSON.

Mechanics' lien—R. S. O. ch. 120—Sale of the property after the lien arose but before registration—Omission of word "owner"—Waiver.

M. having bargained in January with R. & E. to do certain work and supply certain machinery in their mill, the last of the work being done and the last of the machinery supplied on the 28th July, filed his lien on the 25th August and commenced his action 2nd October. On the 24th July, R. & E. had sold and conveyed the mill to P. who, not being aware of this claim, registered his conveyance on 29th July. The lien registered made no mention of P. as "owner" and M. had drawn a draft for part of the money at three months, dated 28th July, which had been accepted by R. & E.

Held, that M. was entitled to his lien notwithstanding the sale to P. That the omission of P. as owner did not invalidate the lien, and that the drawing of the draft did not operate as a waiver of the lien.

THIS was an action for the enforcement of a lien, brought by one John Makins against Thomas W. Robinson, James Elliott, and Alfred P. Poussette.

The action was tried at Lindsay before Ferguson, J., on the 21st November, 1882.

S. H. Blake, Q. C., and Stewart, for the plaintiff.

Moore, for Elliott.

G. T. Blackstock, for Poussette.

No one appeared for Robinson.

The evidence showed that the plaintiff's claim was for work done and machinery supplied to a mill which belonged at the time the bargain was made (January, 1882,) to the defendants Robinson & Elliott, who were running it in partnership as a lumber mill: that the last of the material was supplied on the 27th or 28th July, 1882, and the last of the work done on the latter date: that the lien was registered on the 25th August, and the action commenced on the 2nd October following: that the plaintiff drew on Robinson & Elliott in April for \$200 which draft was accepted and paid by them: and that he drew in the same way on the 28th June for \$100 at two months, and on 28th July for \$200 at three months, both of which drafts were accepted, but before they matured Robinson & Elliott began to get into difficulties: and that Robinson & Elliott had sold and conveyed the mill on the 24th July to the defendant Poussette who had no notice of the plaintiff's claim, and who registered his deed on the 29th July.

The defendants contended that the material was supplied under different contracts, and that although a pulley chain and a wheel costing \$20.70 might have been delivered as late as the 28th July, the evidence showed that 136 feet of another chain was charged for on that day only 35 feet of which were then delivered, the balance having been delivered before, and that these two items did not keep the lien for the whole amount alive and it was consequently registered too late: and that Poussette's deed and the registration of it cut out the lien, and that the lien was not technically sufficient in that the said Poussette was not mentioned as owner, and that he never employed the plaintiff to do any work or furnish any materials.

It was arranged that the argument should take place in Toronto subsequently, and the following points were taken:

That Poussette was not named as the owner in the lien that was registered.

That the conveyance to him of 24th July, 1882, cut out the lien which was not registered until 25th August, 1882.

That the action was not brought within the proper time, nor was the lien registered within the proper time.

That the evidence shewed that the work was completed before the 28th July. The machinery was in fact run on the 20th, and all that was afterwards done was what was necessary to make it work properly. Only 35 feet of the 136 foot chain was delivered as late as the 28th July, although the whole was charged for on that day.

That by drawing the \$200 draft, dated 7th July, at three months, plaintiff, as to this amount, had postponed his right until after the ninety days, and postponing his right to payment beyond the ninety days defeated his lien.

The argument took place before Ferguson, J., on the 30th November, 1882, in Toronto.

G. T. Blackstock, for the defendant Poussette. The plaintiff must stand or fall by the registered lien, and this does not mention Poussette at all. The registration is only against former owners. As to the effect of registration see *Mechanics' Lien Act*, s. 4 sub-s. 2 and 3, *Holmested*, p. 15 note. The right to the lien is in derogation of the common law, and the Act must be strictly construed: *Phillips* on *Mechanics' Liens*, par. 9, and 20. The lien must strictly comply with the Act, and stating the name of the owners is material: *Phillips*, par. 345. The registration was not within thirty days from the completion of the work: *Holmested*, p. 13. "Supplying" or "placing" are the words of the Act, not "delivering." The lien might have been registered before the work was finished and no question would then have arisen as to the time. *Neill v. Carroll*, 28 Gr. 30, is in point. The only work done after July 20th is about \$30 worth. The accepted draft although not *ipso facto* a waiver of the lien still it is evidence of such an intention: *Phillips*, s. 272; *Guernsey's Mechanics' Lien Law*, pp. 24, 25.

S. H. Blake, Q. C., for the plaintiff. There is no waiver here. There cannot be a waiver without an express agreement: *Holmested*, p. 7, s. 3. The property was taken by

Poussette subject to the lien, and he was put upon enquiry. In *Neill v. Carroll*, 28 Gr. 30, the machinery was supplied, used, and accepted, and was working in the ordinary way for about three months. The two distinct things referred to in the Act are the "material" and the "work." As to what the Legislature meant, see p. 345. There was no acceptance of the work in this case until 28th July. The pulley and chain were supplied on that date. The registration of the lien complies with all that is required by the Act. The registration against Robinson & Elliott covers Poussette. The Act says they were the owners as to the plaintiff's lien, and does not say "owner" at any particular time: *Holmested*, p. 5, note "owner:" *Jones v. Shawhan*, 4 Watts and Sergeant, 257; *Sullivan v. Johns*, 5 Wharton's R. 256; *Stockwell v. Carpenter*, 27 Iowa, 120; *Phillips on Mechanics' Liens*, par. 334. There is no evidence that Poussette is a purchaser for value, and it is not to be presumed.

Blackstock, in reply, referred to *Boult v. Wellington Hotel Co.*; *Holmested*, 15; *Douglas v. Chamberlain*, 25 Gr. 288.

March 10, 1884. FERGUSON, J.—[After a full and careful statement of the evidence upon which the learned Judge found that the furnishing and the placing of the machinery continued up to the 28th July, and that the lien was filed in time, and that all the work was done under one contract.] The conveyance to the defendant Poussette on the 24th of July and the registration of it on the 29th of July did not in my opinion defeat the plaintiff's lien. The last clause of the Act is in these words: "Except so far as is herein otherwise provided the provisions of the Registry Act shall not apply to any lien arising under the provisions of this Act," and I do not see that the exception in this section has any application to the facts of this case. The 3rd sub-sec. of sec. 4 of the Act provides that where the statement is registered the person entitled to the lien shall be deemed a purchaser *pro tanto* and within the provisions of the Registry Act.

This provision is in favour of the lien holder. The registration does not create the lien. It is given by the statute, and as I have said, I do not think that the plaintiff's lien was in this case defeated by the conveyance to the defendant Poussette or his registration of it. It was urged for the defence that the registration of the lien was not good because the name of Poussette, who was the "owner" at the time, was not mentioned in it. On this subject I have looked at some of the American cases. In the case of *Jones v. Shawhan*, 4 Watts and Sergeant at p. 262, Chief Justice Gibson says: "But as the claim is against the building instead of the person, and as the name is only a circumstance of description to specify the property and give notice to purchasers, entire accuracy in regard to the ownership may not be indispensable; the more so as the statute expressly requires no more than the name of the reputed owner, and it might be sufficient to file it against the past or the present one. It is certain, however, that the name of the owner when the building was commenced satisfies the requirements of the law." The statute under which that decision was given was somewhat different from ours. Our statute, sub-sec. 3 of sec. 2, says: "Owner shall extend to and include a person having any estate or interest, legal or equitable, in the lands, * * * and all persons claiming under him, whose rights are acquired after the work in respect of which the lien is claimed is commenced, or the materials or machinery furnished have been commenced to be furnished," and sub-sec. b. of sec. 4 says that the statement of claim shall contain the name and residence of the owner; yet I am of the opinion that the reasoning in the case to which I have referred applies, especially when I look at the date of the conveyance to Poussette, and the allegation of the plaintiff that he did not know anything of it, and I am of the opinion that this alleged defect is not fatal, although it has been said that the statute relative to mechanics' liens, being in derogation of the common law, should be strictly complied with. *Wells on Mechanics' Liens*, p. 15, par. 8.

The waiver contended for by reason of the making of the drafts by the plaintiff was not strongly relied on by counsel, and I think the language of Chief Justice Gibson in the case already referred to, at page 263, applicable. I think there was no waiver of the lien, and on the whole case I am of the opinion that the plaintiff is entitled to judgment in his favour in respect of his alleged lien, and the judgment is in his favour in form as is usual in like cases, with costs of suit against the defendants.

G. A. B.

[CHANCERY DIVISION.]

ORFORD V. ORFORD.

Will—Construction—Possession by cestui que trust.

The rule is that when property is devised to a trustee to pay the rents and profits to any person the *cestui que trust* is entitled to the possession; but where other parties have also a claim, it rests in the discretion of the Court whether the actual possession shall remain with the *cestui que trust* or the trustee.

J. O. by his will provided as follows: "4. Notwithstanding the directions hereinbefore contained, I desire that if my son W. O. returns to Toronto within five years from the date of my death, my said executors shall hold in trust for him from the time of his return to Toronto said lots Nos. * * subject to the existing life estate of my said wife in a portion thereof, during the term of his natural life, and shall pay over to him all rents, issues, and profits thereof, and after his death shall divide the same between his children in such manner as he shall in his last will and testament direct, and in default of such direction and appointment to divide said property equally between them, conveying to each child his or her share when, if a son, he attains the age of 21 years, or a daughter attains the age of 21 years or marries, and in the meantime to apply the proceeds of the same to the support and maintenance of said children."

In an action by W. O. against the executors and trustees of the will, claiming the actual possession of the property of which he was entitled to the rents and profits, it was

Held, that he was not entitled to such possession, and his action was dismissed, with costs.

Whiteside v. Miller, 14 Gr. 393, commented on and followed.

THIS was an action brought by William Orford, against Mary Ferguson Orford and Samuel Platt, the executrix and executor and trustees of the will of James Orford, in his lifetime of the City of Toronto, who was the father of the

plaintiff, and the husband of the defendant Mary Ferguson Orford, and who died on or about the 22nd September, 1880.

The plaintiffs statement of claim set out the will which contained the following clause : " 4. Notwithstanding the directions hereinbefore contained, I desire that if my son William Orford returns to Toronto within five years from the date of my death, my said executors shall hold in trust for him from the time of his return to Toronto, said lots numbers * * *, subject to the existing life estate of my said wife in a portion thereof, during his natural life, and shall pay over to him all rents issues and profits thereof; and after his death shall divide the same between his children in such manner as he shall in his last will and testament direct and appoint; and in default of such direction and appointment to divide said property equally between them, conveying to each child his or her share, when if a son he attains the age of 21 years, or a daughter attains the age of 21 years, or marries; and in the meantime to apply the proceeds of the same to the support and maintenance of said children;" and claimed the actual possession of the property as being the *cestui que trust* entitled to the rents and profits for his life, and as such entitled to the possession of the property from which the rents were derived.

The statement of defence of Mary F. Orford admitted the will, but claimed that according to its true construction, the plaintiff was only entitled to be paid the rents, issues, and profits of the property which the executors were always willing to pay. And that under the provisions of the will the said Samuel Platt had been relieved from his position as executor by deed dated 6th July, 1882, and one Edward Galley substituted for him.

The action was tried on the 26th May, 1883, before Ferguson, J., at Toronto.

It appeared that the plaintiff had returned within the five years limited; and on the evidence the learned Judge found that all the rent to which he was entitled had been paid to him.

The defendant, Mary F. Orford, had a life interest in a small portion of one of the lots devised to the plaintiff, but this did not come in question except on apportioning the rent of that lot.

The defendants were willing, if the Court thought proper so to construe the will, to deliver up the possession of the property, but submitted that such was not the intention of the testator.

Moss, Q. C., with him *J. E. Robertson*, for the plaintiff. A direction to pay the plaintiff the rents and profits during his life entitled him to the possession in fact. The ultimate remainder being to his children strengthens this position: *Horner v. Wheelright*, 2 Jur. N. S. 367. The mere fact that the trustees have other duties to perform does not interfere with this: *Denton v. Denton*, 7 Beav. 388; *Whiteside v. Miller*, 14 Gr. 393. If the tenant for life were given the possession the trustees would be relieved of the responsibility.

S. H. Blake, Q. C., for the defendants. If upon the true construction of the will the plaintiff is entitled to possession, then the trustees are willing to give it to him, but not otherwise, and they say that such is not the true construction. The Court will not interfere when those entitled in remainder are infants. An interested party would not be appointed a trustee, and the plaintiff's interest is opposite. When a man is to receive the rents he is to do all that is necessary to get them. He may rent, etc. Here the trustees are to pay the rents to the plaintiff and the estate is in them: *Hawkins* on Wills, 140. Less is required to give the tenant for life the possession for personal enjoyment, than to give the right to have possession for rents and profits: *Whiteside v. Miller*, 14 Gr. 397. The will shows that it was not the intention of the testator to give the plaintiff possession. The sentences (1) "my said executors shall hold in trust for him," (2) "and shall pay over to him all the rents," (3) "after his death shall divide, etc." 4. "in the meantime to apply the proceeds to the mainten-

ance of the children," show this. The will is so plain that nothing is left to conjecture.

Moss, Q.C. in reply. The legal estate may remain in the trustees, while the *cestui que trust* may be entitled to and have possession: *Lewin* on Trusts 7th ed. 579, and *Taylor v. Taylor*, L. R. 20 Eq. 297, were referred to.

March 10th, 1884. FERGUSON, J.—The action is brought by William, the plaintiff, against his mother, Mary F. Orford, and Samuel Platt, who were appointed executors and trustees under the last will and testament of the late James Orford, the plaintiff's father. Mr. Platt, however, about the first day of July, 1882, declined further to act in the trusts of the will, when Mr. Edward Galley was appointed in his place and stead.

The objects of the suit are to obtain possession of lands in which the plaintiff took an interest, under the clause of the will that I will hereafter refer to; and to recover from the trustees some rents that the plaintiff alleged were unpaid.

At the trial I disposed of the question as to the rents in favour of the defendants the trustees by a finding upon the evidence that they had been duly paid to the plaintiff.

Then as to the possession of the property, a large number of lots of land in the city were disposed of by the will; but I think it only necessary to refer to the clause in the will under which the plaintiff takes an interest; this clause is as follows: "4. Notwithstanding the directions hereinbefore contained, I desire that if my son, William Orford, returns to Toronto within five years from the date of my death, my said executors shall hold in trust for him from the time of his return to Toronto said Lots No. 15, 16, 17, 18, 19, and 20; and also said Lot No. 1, subject to the existing life estate of my said wife in a portion thereof during the term of his natural life; and shall pay over to him all rents, issues and profits thereof; and after his death shall divide the same between his children, in such manner as he shall in his last will and testament direct and appoint; and

in default of such direction or appointment to divide said property equally between them, conveying to each child his or her share, when, if a son he attains the age of twenty-one years, or a daughter attains the age of twenty-one years, or marries; and in the meantime to apply the proceeds of the same to the support and maintenance of the said children."

The rule no doubt is, that when property is devised to a trustee, in trust to pay the rents and profits to any person, the *cestui que trust* is entitled to the possession, and this rule appears to apply where the *cestui que trust* is entitled for life only, on this subject. *Whiteside v. Miller*, 14 Grant 393 cited by counsel, as well as the cases referred, to may be looked at.

As I read this clause of the will, it appears to me that the intention of the testator was that the possession of the property should remain with the trustees. I think there can scarcely be a doubt as to this. The present Chief Justice, however, in the above mentioned case, quotes from Sir John Leach, in the case *Tidd v. Lister*, 5 Madd 429, as follows: "There may be very special cases in which this Court would deliver the possession of the property to the *cestui que trust* for life, although the testator's intention appeared to be that it should remain with the trustees, as where the personal occupation of the trust property was beneficial to the *cestui que trust*, there the Court taking means to secure the due protection of the property for the benefit of those in remainder, would, in substance, be performing the trust according to the intention of the testator." Sir John Leach held the case before him not to be a case of special circumstances, adding: "It is not the personal occupation, but the management of the property that is sought by this Bill." This remark of Sir John Leach seems to me applicable here. I have examined the cases referred to by counsel in the argument and others, but I think it would be wearisome, rather than otherwise to give a summary of or extracts from them here.

In *Lewin* on Trusts, 7 ed., at pp. 576, 577, the law is

stated in this way: "The rule that gives the *cestui que trust* the possession is applicable only to the simple trust in the strict sense, for where the *cestui que trust* is not exclusively interested, but other parties have also a claim, it rests in the discretion of the Court, whether the actual possession shall remain with the *cestui que trust* or the trustee, and if possession be given to the *cestui que trust*, whether he shall not hold it under certain conditions and restrictions." For this statement of the law the author refers to a large number of authorities, some of which are referred to in the case: *Whiteside v. Miller*, 14 Gr. 393.

It was stated at the bar that the plaintiff is not a man of business habits at all, and the evidence of his mother was that he was given to drink.

Now looking at the clause of the will which I have set out above, at the facts to which I have alluded, and the short statements of the law, that I have selected from books of undoubted authority, I think it requires no argument on my part to show that the plaintiff's contention that he should get possession of the property should not succeed, and I think the conclusion that the action should be dismissed, with costs, is the only one that can be at all reasonably arrived at, and the judgment is one dismissing the action with costs.

Action dismissed, with costs.

G. A. B.

WITHROW ET AL. V. MALCOLM ET AL.

Patent law—Reissue—Specification—Extended claim—Pleading—Evidence—Certified copies of foreign patents—Patent Act of 1872—35 Vic. c. 26, D.—Imp. 14-15 Vic. c. 99, secs. 7, 11.

Where to an action to restrain certain alleged infringements of a reissued patent, it was objected by way of defence that the reissued patent contained a combination not in the original patent or the application therefor, and was therefore invalid; and it appeared that the combination in question was manifested in the drawings and specifications of the original patent, but by mistake and inadvertence was not separated from the other parts of the description, and made the subject of a distinct claim, so as to be protected by the original patent.

Held, per BORD, C., (affirming the decision of FERGUSON, J.,) that the reissued patent was nevertheless valid. *PROUDFOOT, J., dissente.*

Per BORD, C.—What could have been claimed as part of the invention under the specifications and descriptions accompanying the original patent, but was not by reason of error, mistake, or inadvertence, may be claimed on a reissue if there has been no *laches*. Not what the patentee claims as his invention, but what is for the first time disclosed to the public on his application, is the measure of his rights on a reissue.

Per PROUDFOOT, J.—A reissued patent must be for the same invention as that embraced and secured in the original patent. It is a misconstruction of the Patent Act of 1872, to say it authorizes a reissue "with broader and more comprehensive claims," if by that be meant that it authorizes a reissue with a claim not in the original patent at all; neither is it enough to justify a reissue that all the elements of the new claim may be found in the specifications of the original patent; but if the claim is so imperfectly described, through error or mistake, as not to cover the invention, then a reissue may be had.

Per PROUDFOOT, J.—The earlier decisions in the United States are more in conformity with the language and intention of our Patent Acts than the later decisions, which seem to recognize the right in the reissue to broaden the claims in a manner which the law does not appear to justify.

THIS was an action brought by John Jacob Withrow and John Hillock against James George Malcolm, William Russell, and Miles Macdonald, claiming an injunction restraining the defendants, their servants, workmen, and agents, from selling or disposing of certain refrigerators already manufactured by them, and from continuing to manufacture and sell refrigerators, infringing upon certain patents held by the plaintiffs, and from in any way infringing upon the plaintiffs' rights under the said patents.

The facts of the case are stated in the judgments.

The action was tried at Toronto on February 24th, 25th, 27th, and March 1st, 3rd, 4th, and 6th, 1882.

The following were the arguments of counsel as regards the points of law involved in the case:

J. E. Macdougall and *Shepley* for the plaintiffs. A claim is not essentially necessary to a patent: *Lister v. Leather*, 8 Ell. & B. 1004. As to what a specification must contain we refer to *Higgins's Patent Cases*, Nos. 390, 391, 393; *Wegmann v. Corcoran*, L. R. 13 Ch. D. 65; *Seymour v. Osborne*, 11 Wall. 516, reported also in *Whitman's Patent Cases*, p. 291; *Plimpton v. Spiller*, L. R. 6 Ch. D. pp. 421, 423. The drawings are a part of the specification, and they are to be read together and corrected by one another: *Curtis on Patents* (1875), sec. 262. As to the question of novelty, if a new combination produces a better result than a former combination of the same materials, it is patentable. If a new and useful result has been obtained, the patent must be sustained, notwithstanding the same elements may have been somewhat similarly arranged and combined before. But the American patents here in question are not publications at all, because they do not disclose any practical way of carrying into effect any useful purpose. As to this part of the case we cite *Neilson v. Betts*, L. R. 5 H. L. 1; *The Cornplanter Patent*, 23 Wall. 181; *Christman v. Ramsey*, 17 Blatch. 148; *In re Lamendé's Patent*, 2 Webster's Pat. Cas., pp. 164; *Paterson v. The Gas Light and Coke Co.*, L. R. 2 Ch. D. pp. 812, 823; *Betts v. Menzies*, 10 H. L. C. 117; *Hills v. Evans*, 8 Jur. N. S. 525, referred to in *Higgins's Pat. Cas.* No. 165. Moreover, the official *Gazette* is not admissible in evidence, on such insufficient proof as that tendered here(a). As to the United States patents, Imp. 14-15 Vic., c. 99, secs. 7, 11 are of doubtful import, and not sufficient to warrant their reception in evidence. The words, "not known or used by others," in the Patent Act, 35 Vic. ch. 26, D., sec. 6, mean "not known or used by others in Canada," and "public user,"

(a) The method of proof was as follows: Mr. Donald Ridout, a practical engineer of Toronto, being called as a witness by the defence, produced six volumes of the *Official Gazette of the United States Patent Office*, and deposed that he ordered that publication direct from the United States Patent Office; that he had never seen it except in his own office; that he had never seen it on sale in Canada, and that, so far as he knew, the only way of procuring it was the method adopted by him.

in that section means "public user in Canada." See *Smith v. Goldie*, 7 O. A. 628. The foreign patent under sec. 11 of that Act must be a patent for the identical invention by the same inventor, and the last clause as to the expiry of such patent is conclusive on this proposition. Moreover no authority can be found shewing that an Act of a foreign state can be proved in a court of justice. The American patents cannot be proved at all: they are not evidence of publication because there must be publication in Canada; and they are not foreign patents under sec. 7, because not to the same inventor or his assigns. Moreover, even if it were granted that the principle of the watersheds and trough were shewn by the American patents, yet the plaintiffs are entitled to a patent on the ground of entirely superior merit. *Lister v. Leather*, *supra*, has never been overruled, though some of its doctrines have been varied. The law substantially is, that a part of the combination cannot be taken to effect the same object without an infringement: *Clark v. Adie*, L. R. 10 Ch. 667, S. C. 2 App. Cas. pp. 315, 355. The question is, has the combination been substantially taken, or has there been "a colourable imitation?" *Thorne v. The Worthing Skating Co.*, L. R. 6 Ch. C. 415 (foot note); *Flower v. Lloyd*, L. R. 6 Ch. D. 297. There must be an adoption of that which constitutes *the essence of the combination*: every step of the combination need not be adopted by the alleged infringer: *Adair v. Young*, L. R. 12 Ch. D. 13. It is to be noticed the words "*first and true inventor*," which occur in secs. 5 and 6 of 21 Jac. 1, and the words "*original and first inventor*," in the American Act referred to in *Curtis on Patents*, 4th ed. at p. 723, are not paralleled by any expressions in our Act. We also cite *Crane v. Price*, 4 M. & G. 580; *Murray v. Clayton*, L. R. 7 Ch. 584; *Cannington v. Nuttall*, L. R. 5 H. L. pp. 205, 216; *Lewis and another v. Marling*, 1 Webster's Pat. Cas. 496, S. C. 10 B. & C. 22; *Huiks and Son v. Safety Lighting Co.*, L. R. 4 Ch. D. 615; *Sykes v. Howarth*, L. R. 12 Ch. D. 826.

W. Cassels, for the defendants Malcolm and Macdonald. A "claim" of a patentee amounts to a disclaimer of all that he does not specifically claim. He may claim a reissue where he claims too much, or where the patent is defective by reason of insufficient specification or description, but not where he has claimed too little, for he has given to the public what he has not claimed. See Patent Act 1869, (Canadian), 32 & 33 Vic. ch. 11, sec. 14; *Plimpton v. Spiller*, L. R. 6 Ch. D. 412, 429; *Foxwell v. Bostock and others*, 12 W. R. 723; *Seymour v. Osborne*, 11 Wall. 516; *Russell v. Dodge*, 93 U. S. R. 463; *Powder Co. v. Powder Works*, 98 U. S. R. 126; *Manufacturing Co. v. Ladd*, 102 U. S. R. 408; *Manufacturing Co. v. Corbyn*, 103 U. S. R. 786, *Harrison v. Anderson Foundry Co.*, L. R. 1 App. Cas. 575, which last case overrules *Lister v. Leather*, *supra*. There is no such thing as a reissue, unless the claim is inoperative or too large, or in the converse case of the claim being valid, but the specification being defective. See *Miller & Co. v. The Bridgeport Brass Co.*, 21 U. S. Off. Gaz., 201. The omission of a part of the invention in the claim is a dedication to the public of that part. The statute does not in words enable the patentee to expand his claim, and it is natural to suppose it was not in the mind of the Legislature that he should be able to do so. See *James v. Campbell*, 21 U. S. Off. Gaz. 337. If section 19 of our Patent Act of 1872 was looked at alone, one could never conceive that there could be such a reissue as this, and section 20 serves to illustrate section 19 and shews our contention as to it is correct. The statute 38 Vic. 13, D., has no application to this case. I refer also to *Hunter v. Carrick*, 28 Gr. 489; *Pickering v. McCullough*, 21 U. S. Off. Gaz. 73; *Murray v. Clayton*, L. R. 7 Ch. 570, S. C., 10 Ch. 675, 676, (foot-note); *Seed v. Higgins*, 8 H. L. C. 550; *Plimpton v. Malcolmson*, L. R. 3 Ch. D. 531, 557; *Thorn v. Worthing Skating Co.*, L. R. 6 Ch. D. 415, (footnote); *Harwood and another v. The Great Northern R. W. Co.*, 11 H. L. C. 666; *Abell v. McPherson*, 17 Gr. 24, S. C., in appeal 18 Gr. 437; *Hailes v. Van Wormer*, 7 Blatch. 443; *Betts v. Menzies and another*, 10 H. L. C.

117, 134; *Barter v. Howland*, 26 Gr. 135; *Van Norman v. Leonard*, 2 U. C. R. 72; 7 Geo. IV., ch. 5; 35 Vic. ch. 26, D. (1872); Consol. Stat. C. ch. 34, sec. 3. Section 7 of the Act of 1872 does not apply to a patent abroad by the same inventor solely. If this were otherwise section 48 would have no meaning. See also, sec. 40, sub-sec. 5, and the parenthesis in it.

J. E. Macdougall, in reply as to sec. 40, sub. 5, the parenthesis applies to an American inventor who comes to get his patent here. On the question of reissue see an article by W. Baldwin in American Law Review for January, 1882. I refer also to *Yale Manufacturing Co. v. Scoville Manufacturing Co.* 18 Blatch. 248; *The Cornplanter Patent*, 23 Wall. 121; *Herring v. Nelson*, 14 Blatch, 293; *Adair v. Thayer*, 17 Blatch, 468; *Yates v. Great Western R. W. Co.* 2 A. R. 226; *Russell v. Hawley*, 1 Webster's Pat. Cas., 457. There should be no astuteness to pick holes in a patent. The specifications should be read so as to support the patent if that can be done; certainly nothing should be intended against the patent:—*Stevens v. Keating*, Higgin's Pat. Cas. No. 576; *Ib.* Nos. 222, 223, 224. See also *Penn v. Bibby*, L. R. 2 Ch. 127. If the doctrine that all is dedicated to the public that is not claimed by the "claim" were true to the full extent there could be no reissue at all. If there is a mistake by the patentee, or even a mistake of the patent office, there may be a reissue: *Curtis* on Patents, 4th ed., sec. 282.

The following were also referred to: *Re Cutlers' Patent*, 1 Webs. Pat. Cas., 427; *Higgin's Pat. Cas.* p. 430; *Reutzen v. Kanowrs*, 1 Wash. C. C. R., 168; *Patric v. Sylvester*, 23 Gr., 573; *Owens v. Taylor*, 29 Gr., 210; 14-15 Vic., c. 99, secs. 7, 11.

September 9th, 1882. FERGUSON, J.—On August 14th 1880, one John Alexander obtained a Canadian patent, numbered 11,639, granting to him as the inventor thereof the exclusive right of making, constructing, &c., the invention in the said patent which is called and known by

the name of "The Alexander Refrigerator." The period of the grant was five years from the date of the patent. In his specification, attached to the patent, he says :

"The object of the invention is to secure as much as possible the direct effect of the ice, and at the same time arrange the hot and cold air flues so that the two currents shall not come in contact, and it consists in carrying the ice upon an open rack, separated from the provision chamber by an open water shed arranged so as to permit the free downward passage of the cold air into the provision chamber and, at the same time to prevent the passage of the water thrown off the ice into the said provision chamber, as hereafter more particularly explained."

Drawings are attached to the specifications and patent, and the various parts of the invention are described by reference to these drawings.

He then says :

"What I claim as my invention is:—1st. In a refrigerator, an air chamber I, separated from the ice chamber by an open rack, and connected by the flues G and J to the provision chamber B, substantially as shewn.

"2nd. In a refrigerator, an open ice rack C, in combination with a water shed D, and trough E, substantially as shewn.

"3rd. In a refrigerator, an ice rack C, water shed D, trough E, and slanting boards H, in combination with the flues J and G, arranged substantially as described for the purpose of securing the full benefit of the ice in the chamber A, for cooling the chamber B, without the air used for that purpose coming in contact with the ice in the said chamber A."

This patent was duly assigned by Alexander to the plaintiffs on March 24th, 1881.

On June 9th, 1881, Alexander obtained another Canadian patent for another refrigerator called "The Improved Arctic," which is numbered 12,928. In his specifications for this patent he says :

"The object of the invention is to construct a perfectly ventilated refrigerator in which the full effect of the ice is secured, combined with a perfectly pure atmosphere within the cooling chamber, and it consists in a flue located on the back of the refrigerator, and leading from the bottom of the cooling chamber to and out of the top of the refrigerator, the bottom of the cooling chamber being made to slant from the front of the box to the rear, where the ventilating flue opens out. Near the top of the refrigerator there are air holes made through the outside skin to the warm air passage, leading into the ice chamber, substantially as and for the purposes hereinafter explained."

The drawings are then referred to, figure 1 being a front section, and figure 2 a cross section of the refrigerator.

He then says :

“ My invention relates to that class of refrigerators upon which I secured a patent last year. As shewn in the drawing, A is the ice chamber, B the cooling chamber, separated by the partition C, the construction of which has already been patented by me, and through which the cold air passes. D are the warm air passages situated on each side of the box, and separated from the ice chamber by the partitions E. These partitions are separated from the ice by racks F, which protect the cold air passages G, leading down into the cold chamber B, as shewn.”

Then follows another minute description of the ventilating flue, and the mode of its alleged operation, which do not appear to be of much importance in the contention between the parties.

He then says :

“ The pure air ascending to the top of the chamber will naturally find its exit therefrom, through the warm air passages I,” (no doubt this should be the letter D as in the drawing,) “ which conduct it into the ice chamber A, as indicated by arrows.

“ The ventilator on the sides of the refrigerator connect with the warm air passages G, admitting a certain quantity of fresh air, which mixes with the warm air ascending through the flue and passes into the ice chamber from whence it descends through the partition C, and cold air passage G, and again into the cooling chamber B. The circulation being thus maintained fresh air is constantly being carried through the cooling chamber B, and any foul air carried away by the ventilating flue, as hereinbefore explained.”

He then says :

“ What I claim as my invention is, 1. In a refrigerator having cold air passages for conducting the cold air from the ice chamber to the cooling chamber, and separate air passages for re-conducting it into the ice chamber, the combination of a vertical ventilating flue leading from a point at or near the bottom of the cooling chamber to a point outside the refrigerator at or near its top.”

This patent No. 12,928, was surrendered on the 18th day of August (September), 1881, and another patent, numbered 13,444, issued in its place.

Apart from the specific claims made, the specifications for this reissued patent are substantially the same as

those for the surrendered patent. What changes there are seem to me to have been for the purpose of correcting clerical errors, and making the meaning somewhat plainer. In these specifications, however, Alexander says:

"What I claim as my invention is, 1st. The vertical ventilating flue H leading from a point at or near the bottom of the cooling chamber B to the exit K outside the refrigerator at or near the top, as specified. 2nd. The vertical ventilating flue H in combination with the ventilator or ventilators L over the warm air passage D into the ice chamber as specified. 3rd. The vertical ventilating flue H in combination with a cold air passage or passages G from the sides of the ice chamber with a guard or guide M directing cold air from the side passage or passages to the centre of the cooling chambers as specified. 4th. The vertical ventilating flue, H in combination with the open rack F and water-sheds C and trough C, substantially as shown. 5th. The cold air passage G from the sides of the ice chamber R in combination with the open ice rack F and water-sheds C and trough C, as specified. 6th. A warm air passage or passages D in combination with the open ice rack F and water-shed C and trough C, as specified."

Other claims are made but they do not appear to be of importance in the contention here, excepting in so far as it may be thought that they or any of them affect the validity of the reissued patent.

The drawings attached to the specifications for the surrendered patent seem to be precisely the same as those attached to specifications for the reissued patent, excepting the change of one letter, plainly to correct an error to which I have before alluded, and the addition of some four letters, for the purpose, apparently, of reference only. (a)

(a) The other claims were as follows:—

7. The slanting bottom N in a refrigerator falling towards and in combination with the receiving chamber I and the vertical ventilating flue H as shewn.

8. The receiving chamber I cut through the inner skin of the refrigerator and properly encased so as to direct the draught towards the ventilating flue H as shewn.

9. The combination of a vertical ventilating flue H ventilators L at the top of warm air passage D into ice chamber cold air passage G from sides of ice chamber the guard or guide M directing cold air, to centre of cooling chamber upon ice-rack F watersheds C trough C, and slanting bottom N of the cooling chamber and receiving chamber I at the rear of said bottom as described and set forth.

(a) See the plan on adjoining page.

This reissued patent was duly assigned to the plaintiffs on the 24th day of September, 1881, and the plaintiffs have been manufacturing under these patents respectively from the respective dates of the assignments to them. The evidence, uncontradicted I think, shews that the refrigerator made according to the reissued patent is much superior to the one made according to the firstly mentioned patent, by reason of its producing a much cooler chamber, but at the same time consuming more ice; yet that some of the plaintiffs' customers, who do not want the very cool chamber, prefer the other.

The plaintiffs contend that the defendants Malcolm and Macdonald have been manufacturing a refrigerator, a model of which is known in the evidence as model G, and that in so doing they have infringed upon the plaintiffs' patents by infringing claims Nos. 1 and 2 of the first patent and claims Nos. 5 and 6 of their reissued patent; and that the defendant McDonald has been manufacturing a refrigerator the model of which is known in the evidence as model F, and that in so doing he has infringed upon the plaintiffs' first patent by infringing claims Nos. 1, 2 and 3 of the same.

The action has been dismissed as against the defendant Russell.

The defendants contend that Alexander was not the inventor: that the alleged inventions were not of sufficient utility and importance to be the subjects of patents respectively: that the alleged inventions were not novel. They deny the validity of the reissued patent, and they deny the alleged infringements. It is also contended that it is not shewn that the defendants Malcolm and Macdonald were jointly concerned in the manufacture of the refrigerator of which G is the model.

No technical question was raised as to the joinder of parties defendant.

If the question were or could be entirely separated from the question of novelty, or want of novelty, I do not think that, on the evidence, it could be seriously urged that Alexander was not the inventor; and, assuming that the inventions

"THE IMPROVED ARCTIC."

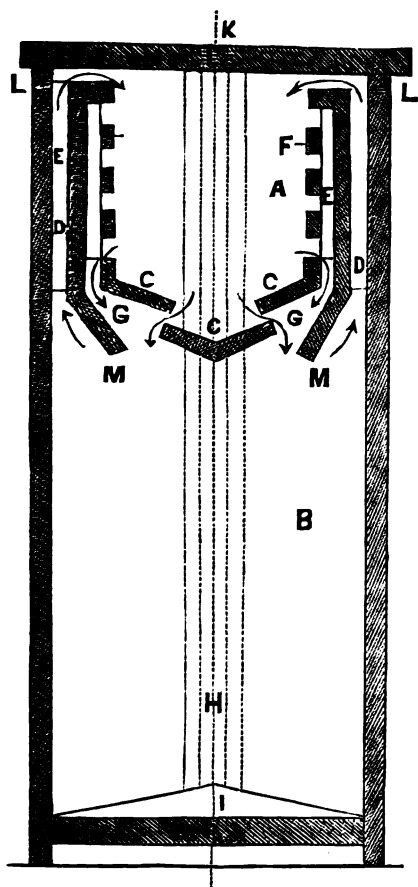


FIG. 1.

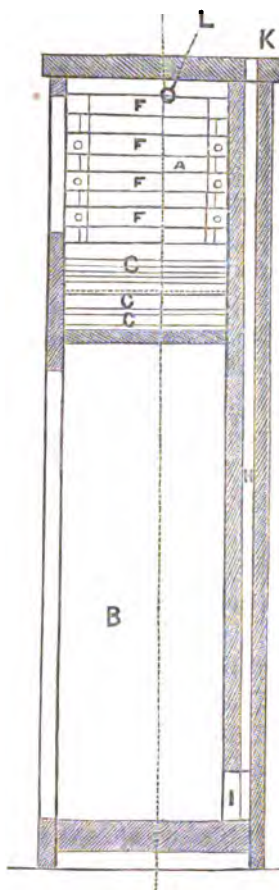


FIG. 2,

- A. Ice Chamber.
- B. Cooling Chamber.
- C. Partitions or Water Sheds.
- C'. Trough.
- D. Warm Air Passages.
- E. Partition.
- F. Racks.

- G. Cold Air Passages.
- H. Ventilating Flue.
- I. Receiving Chamber.
- K. Exit of Ventilating Flue H.
- L. Ventilators.
- M. Slanting Boards or Guides.
- N. Slanting Bottom.

were new, I think there can be no real question as to the sufficiency of their utility. I am of the opinion that the evidence shews each of them to be sufficiently useful and important to be the subject of a patent. I am also of the opinion that the evidence shews clearly enough that the defendants Malcolm and Macdonald were jointly interested in the manufacture of the refrigerator before mentioned, and represented by model G. I consider the evidence abundant to shew this. The manner and statements of these defendants themselves in their attempted denial of this were to me not a little convincing that the fact was as I have said.

The issues to be determined, those argued most strenuously by counsel, are as to the validity of the reissued patent, as to the novelty of the inventions, and as to whether or not the alleged infringements or any of them took place.

As stated by Mr. Justice Proudfoot, in *Hunter v. Carrick*, 28 Gr. at p. 497, the 19th section of our Act of 1872, 35 Vic. ch. 26, D., is similar in terms to section 4916, of the American Patent Law, (*Bump on Patents*, p. 170) and this being so the decisions of the Courts in the United States respecting the reissue of patents afford a guide as to the proper interpretation of the section of our Act. The subject is very fully treated of in *Curtis on Patents*, 4th ed. from sections 279 to 285. I think it is clear from what is there stated and from a large number of cases to which I was referred by counsel that a reissued patent must be for the *same invention* as was the patent surrendered upon the reissue taking place, and that the reissue can include no new invention, that is, no invention not comprehended in the surrendered patent whose place it takes. It was argued in this case that the "claim" cannot, upon the reissue of a patent, be enlarged and I apprehend this is correct, if the meaning is that by enlarging the claim or extending it the invention is enlarged so to speak, that is, something new is imported into the reissued patent, some invention not contained or comprehended in the surrendered one, but this is not, or is not always the meaning of enlarging the claim.

In *Parkham v. The American Button Hole Overseaming and Sewing Machine Co.* 4 Fisher's Pat. Cas. 468, as quoted in the foot note on page 354 of Curtis on Patents, the learned Judge is reported to have said: "The only ground then on which the allowance of a reissued patent is open to objection is that the commissioner has exceeded his authority in granting a reissue for an invention different from the one embraced in the original patent. If both are for the same invention the decision of the commissioner is unimpeachable, and the reissued patent with a new specification is to be substituted for the old, as the evidence of the patentee's title, and of the nature and object of his invention. Differences in the description and claims of the old and new specifications are not the tests of substantial diversity, but the description may be varied and the claim *restricted* or *enlarged* provided the identity of the subject matter of the original patent is preserved. Within this range whatever change is required to protect and effectuate the invention is allowable, (citing *Battin v. Taggart*, 17 How. 84). Nor is the alleged discrepancy to be determined by a reference exclusively to the two specifications, the drawings and model filed with the original specification are also proper subject of consideration and are often of decisive weight; *Seymour v. Osborne*, 11 Wall. 516."

In *Seymour v. Osborne* it is said that interpolations in the reissue of new features or ingredients or devices which were neither described, suggested, nor substantially indicated in the original specifications, drawings or patent office model are not allowed, and in the same case it is said that the identity of invention in the original and reissued patent is a question of comparison of the two instruments to be made by the Court. In the *Powder Co. v. The Powder Works*, 98 U. S. R. 126, at p. 138, in speaking of a reissue it is said that the invention must be the same, and that what might be the subject of a new application cannot be introduced into a reissue, and that the inventor cannot add other inventions which though they might be his, had not been applied for by him, or if applied for had been abandoned or waived.

In *Yale Lock Manufacturing Co. v. Scovill Manufacturing Co.*, 18 Blatch. at p. 257, it is said: "If the patentee has made a palpable mistake, and has limited his real invention by a misstatement of its principles so that he is about to lose the fruit of his labour, he should be permitted to restate, and, if need be, to enlarge his specification, so as to include the same invention which was plainly the subject of, but was not fully secured by the original patent, although, literally, the enlarged invention is one that he did not apply for in his original specification, because that specification by a misstatement of his actual invention, applied for a narrower patent than he was entitled to have."

In *Foxwell v. Bostock*, 12 W. R. 723, it is said that in a patent for an improved arrangement or new construction of machinery the specification must describe the improvement, and define the novelty otherwise, and in a more specific form than by a general description of the entire machine, it being part of the condition of a patent that the specification shall particularly describe and ascertain the invention. When one looks at the specification and claim in that case, which was the case of a patent for improvements in a sewing and stitching machine, it is found to be almost, if not quite impossible, even to conjecture what was really meant by the application.

In *Adair v. Thayer*, 17 Blatch. 470, the Court said: "The defendants argue and insist that as the inventor separated his claim into parts, each part must stand by itself and be held to cover only devices mentioned in it. If this construction should be adopted the patent would be defeated. The patent is a *grant* and is to be fairly and liberally construed in favour of the grantee to effectuate the intention of the parties to it. * * Construing according to this rule the whole subject of the patent must be looked at."

In the cases of *James v. Campbell*, *Clextan v. Campbell*, and *Campbell v. James*, in the Supreme Court of the United States, decided January 9th, 1882, and reported in

the *Official Gazette* of the Patent Office, January 31st, 1882, (vol. 21 at p. 337), it was held that a reissue of a patent dated October 4th, 1870, for an improved post office stamp for printing the post mark and cancelling the postage stamp at one blow, was void by reason of not being for the same invention specified in the original.

In that case the original patent had been issued in 1863, surrendered and reissued in 1864, again surrendered and re-issued in 1869, and again surrendered and reissued in 1870. The Court, in giving judgment, said: "When a patent fully and clearly without obscurity describes and claims a specific invention, complete in itself, so that it cannot be said to be inoperative or invalid by reason of a defective or insufficient specification, a reissue cannot be had for the purpose of expanding and generalizing the claim so as to make it embrace an invention *not described* and specified in the original," and after adopting the language of Mr. Justice Grier, in delivering the judgment in the case of *Burr v. Duryee*, 1 Wall. 577, continued: "Of course if by actual inadvertence, accident or mistake innocently committed, the claim does not fully assert or define the patentee's right in the invention specified in the patent, a speedy application for its correction, before adverse rights have accrued may be granted, as we have explained in the case of *Miller v. Bridgeport Brass Co.*, but where it is apparent on the face of the patents, or by contemporary records, that no such inadvertence, accident, or mistake as claimed, in a reissue of it could have occurred, an expansion of the claim cannot be allowed or explained."

In *Miller & Co. v. Bridgeport Brass Co. U. S., Off. Gaz.* January 17th, 1882, vol. 21 at p. 201, (a) the patent for an alleged improvement in lamps had been granted in October, 1860. It was surrendered and reissued in 1873, and again in 1876. The suit was to restrain infringement and for an account. The Court dismissed the bill on the ground that the second reissue, on which the suit was

(a) Also reported 104 U. S. R. 350.

brought, was not for *the same invention* as that described and claimed in the original patent. In giving judgment the Court said: "Now, while as before stated, we do not deny that a claim may be enlarged in a reissued patent, we are of opinion that this can only be done when an actual mistake has occurred, not from mere error of judgment (for that could be rectified by appeal) but a real *bond fide* mistake, inadvertently committed, such as a Court of Chancery in cases within its ordinary jurisdiction, would correct. * *"

The Court in that case in dealing with a delay for several years, said: "If two years' public enjoyment of an invention with the consent and allowance of the inventor, is evidence of abandonment and a bar to an application for a patent, a public disclaimer in the patent itself should be construed equally favorably to the public. Nothing but a clear mistake or inadvertence and a speedy application for its correction is admissible when it is sought merely to enlarge the '*claim*.'"

The Court also pointed out a distinction that should be made in considering the matter of delay between the case of a reissue for want of a full and clear description of the invention, and one where the reissue is for the purpose of enlarging the scope of the patent, saying that in the latter case the rule as to *laches* should be strictly applied.

I have, in the light afforded by the cases to which I have referred and many others that were cited by counsel which it would be tedious, and perhaps not profitable, to mention here, considered the question as to whether or not the invention in the reissued patent is the same invention as that in the surrendered patent. I have placed together the specification and drawing appertaining to the surrendered patent and the several claims appertaining to the reissued patent, and read them as if they were intended to be read together and the one intended to refer to the other, and in so doing I find, after making the changes respecting letters that I have already mentioned, all that is claimed by the claims in the reissued patent manifested in the specification and drawing of the original one.

No patent office model was referred to at the trial; and having considered the question in every way as well as I am able, I have arrived at the conclusion that the invention claimed in the reissue is the same as that in the original and that in obtaining the reissue Alexander did not introduce anything in the nature of a substantially new invention. The similarity of the drawings, the sameness of the positions of the figures representing bended arrows shewing the directions of the currents of air, the specifications, apart from the specific claims, being almost identical, and the comparatively short space of time that elapsed between the issue of the surrendered patent and that of the reissue lead, I think, to the conclusion that Alexander made a mistake in not claiming the whole of the invention at the time he obtained the surrendered patent, and I see no reason to doubt that this mistake was, to use an expression found in some of the cases, a mistake honestly made, and, looking at the periods that are shewn to have elapsed in other cases between the dates of the issuing of the originals and the applications for the reissues, I think the delay in this case cannot be considered too great. I am of the opinion that the reissued patent is good, if the original surrendered patent was not bad for want of novelty.

Then as to the novelty of Alexander's inventions, it was only necessary for the plaintiffs at most to make a *prima facie* case, to call upon the defendants to shew affirmatively that they were not new: *Galloway v. Bleaden*, 1 Web. Pat. Cas. 526. This, I think, the plaintiffs did. As a matter of pleading it seems to be unnecessary to allege that the invention was new; the allegation of the grant and the production of the letters patent, throw upon the defendant the onus of disputing the novelty: *Amory v. Brown*, L. R. 8 Eq. 663; 38 L. J. Chy. 593.

The defendants contended that a refrigerator which in the evidence was called the "Murphy patent" anticipated some of the claims in the inventions of Alexander. The plaintiffs had, before the inventions of Alexander, been

manufacturing this Murphy refrigerator, and at that time Alexander was their book-keeper and had a knowledge of their business. The manufacture of refrigerators under this patent was not successful; and the evidence shews that, so far as the plaintiffs were concerned, if a better refrigerator could not be procured the manufacture would cease. There is no doubt, I think, that it was Alexander's knowledge of this business that caused him to begin to think on the subject of improvements; but after having carefully examined the patent and model in connexion with the evidence on the subject, I am of the opinion that each one of his inventions claimed is a thing quite different from any thing that is shewn or disclosed by this Murphy patent refrigerator, and that his inventions were not, nor were any of them, anticipated by it.

The defendants called Mr. T. R. Bain, who gave evidence respecting a certain refrigerator, a few of which were sold by him during the years 1875 and 1876. The plaintiffs had made the wood work of these, and Bain's firm made the rest, (the zinc part.) It was sought to show that a part of this was identical with claim No. 2 of the plaintiffs' first patent: there was no model of this refrigerator. After a careful consideration of the evidence respecting it, I am of the opinion that the defendants did not succeed in showing this to be the same as the second claim of the plaintiffs' first patent, and I think it was not shown to have *anticipated* it. I think the construction of the two are not the same, and besides the evidence concerning this machine sold by Bain seems to me too general and vague and not given in a manner that would justify a finding upon it in favor of the defendants' contention. A patent obtained by the defendant Malcolm in 1879 for a refrigerator called the "Climax Refrigerator" was put in evidence for the purpose of showing want of novelty in Alexander's inventions or some of them, there was a model of this refrigerator also put in, but, I think it clear beyond all doubt that the defendants failed in this.

A patent obtained by one Beck in 1867 for a refrigerator

called "Beck's Refrigerator" was also put in evidence but I cannot perceive that this anticipated any of the claims of Alexander in either of his patents.

A patent for a refrigerator called the "Stephens Refrigerator" obtained by David A. Stephens on March 3rd, 1879, was put in by the defendants. It was contended that some of the claims of the plaintiffs were shown in this patent but after a perusal of it and examination of the evidence of the expert witnesses, (who did not agree), I have arrived at the conclusion that the defendants cannot succeed in this contention. The same may be said of the patent for "Birdsall's Refrigerator Building," dated October 15th, 1878, and granted to Richard M. Birdsall.

Certified copies of five United States patents (two of them being for the same inventions respectively as the Stephens and Birdsall patents above mentioned, (they being the patentees) were offered in evidence for the purpose of shewing that the inventions, or some of them, in the plaintiffs' patents had been patented in a foreign country more than twelve months prior to the application for a patent here, &c. Objection was made to the admission of these copies as evidence. Defendants' counsel was relying upon a consent, but counsel could not agree as to what was meant by the consent. Plaintiffs' counsel was willing that the copies should be put in without putting defendants to the expense of getting evidence from Washington, U. S., if the patents could be proved by getting such evidence; but contended that they could not, &c. I inclined to the opinion that the copies could be read in evidence under the provisions of the Imperial Acts 14 & 15 Vic. ch. 99, secs. 11 and 7, and the copies were received subject to the objection. Owing, however, to the view that I have taken respecting these patents, it is not necessary that I should decide the question raised (as to which I cannot say that I have much doubt), for, after a perusal of the copies and the evidence relating to them, where such evidence was given, I think it clear that they do not, nor does any of them, disclose the claims in the plaintiffs' patents, or any of them. So far as

I am able to discover from these U. S. patents and the evidence of the skilled witnesses, no one of the combinations claimed by the plaintiffs was the subject of any one of these patents; and I think the defence has failed to shew any anticipation of the inventions, or any of them, in the plaintiffs' patents; and I am of the opinion that the inventions in question must, for the purposes of this suit, be considered new inventions.

There remains the question as to whether or not the alleged infringements, or any of them, took place.

There were models of the refrigerators manufactured by the plaintiffs according to their respective patents. These were known in the evidence as models H and I; the model H being a model of the refrigerator manufactured according to the first patent, and the model I being a model of a refrigerator manufactured according to the reissued patent. No question was raised as to the correctness of these models, or of the others that I have mentioned.

After a comparison of these models, made as carefully as I am capable of doing it, and after reviewing the evidence of the witnesses on the subject, and having had the benefit of the arguments and explanations of counsel who seemed to have given very great attention indeed to the subject, I am of the opinion that it has been shewn that the first and second claims in the plaintiffs' first patent have been infringed by the manufacture of the refrigerator made by the defendant Malcolm, and also by the manufacture of the refrigerator made by the defendants Malcolm and Macdonald. I am also of the opinion that the third claim in the plaintiffs' first patent has been infringed by the manufacture of the refrigerator made by the defendant Malcolm. I am also of the opinion that the sixth claim in the plaintiffs' reissued patent has been infringed by the manufacture of the refrigerator made by the defendants Malcolm and Macdonald.

I am of the opinion that the fifth claim in the plaintiffs' reissued patent has not been shewn to have been infringed either by the manufacture of the refrigerator made by

the defendant Malcolm, or of that made by the defendants Malcolm & Macdonald. I do not find the cold air passage G, shewn in the drawing attached to this patent and found in the models of the refrigerator manufactured by the plaintiffs according to this patent, delivering the air into the chamber below the watershed, in either of the models of the refrigerators made by the defendants. In both the models of the refrigerators manufactured by the defendants the cold air passing downwards is first delivered into a different chamber, the one above the watershed. The location of the cold air passage G, shewn on the drawings, and there indicated not only by the letter but also by the bended arrows, seems to me quite unmistakable, and the passage is not found in that location in the models of the refrigerators made by the defendants, or either of them.

There was much contention as to the alleged infringement of claim No. 3 of the plaintiffs' first patents, one of the chief grounds of such contention being as to the alleged absence of what are called the "slanting boards H," in that claim, but after considering the evidence of Ridout, called by the plaintiffs, and of Sangster, called by the defendants, as well as the other evidence on the subject, and again examining the models, I am of the opinion that it is shewn that the projection on the lower side of what is called the "water-shed" in the refrigerator manufactured by the defendant Malcolm, is a contrivance which is a colorable imitation of the slanting boards, and performs in a manner the same office. Sangster does not wholly contradict this. Ridout says it is the fact, and such is my conclusion.

As to the point so much contended for respecting the flue known in the evidence G g, I adopted, after much anxiety, the view stated in the evidence of Mr. Ridout. The effect is, that the defendants cannot manufacture either of the refrigerators which was being manufactured by them.

The plaintiffs are entitled to the injunction. They are also entitled to an account if they desire it, and to the costs of suit.

Afterwards on February 15th, 1883, the defendants moved by way of appeal to the Divisional Court, and the case was argued on the 15th, 16th, and 17th of that month before Boyd, C., and Proudfoot, J.

S. H. Blake, Q.C., and W. Cassels, for the defendants.
J. E. Macdougall, and Shepley, for the plaintiffs.

The line of argument adopted by counsel was the same as in the Court below.

The following additional authorities were referred to: *Vance v. Campbell*, *Whitm. Pat. Cases*, p. 9; *Eames v. Godfray*, *ib.* p. 24; *Prouty v. Ruggles*, *ib.* p. 25; *Gould v. Rees*, *ib.* p. 443; *Perry v. The Co-operative Foundry Co.*, 22 U. S. Off. Gaz. 1624; *North v. Williams*, 17 Gr. 179; *Abell v. McPherson*, *ib.* 24, S. C. in Appeal 18 Gr. 437; *Hunter v. Carrick*, 28 Gr. 489; *New v. Warren*, 22 U. S. Off. Gaz. 587; *Searls v. Bouton*, 22 U. S. Off. Gaz. 946; *Waterbury Brass Co. v. Miller*, 9 Blatch. 77; *The Suffolk Co. v. Hayden*, 3 Wall. 315; Articles in American Law Review for November, 1881, Vol. 2, N. S. p. 731, and February, April, and September, 1882, Vol. 3, N. S. pp. 163, 296, 661; *Wheeler v. Clipper Mower and Reaping Co.*, 10 Blatch. 186; *Gallahue v. Butterfield*, 10 Blatch. 237; *National Spring Co. v. Union Car-Spring Manufacturing Co.*, 12 Blatch. 80; *Christman v. Remesey*, 17 Blatch. 148; *Sykes v. Howarth*, L. R. 12 Ch. D. 826; *Adie v. Clark*, L. R. 3 Ch. D. 134; *Taylor v. Garretson*, 9 Blatch. 156; *Curtis on Patents*, pp. 446, 722, 733; *Sellers v. Dickinson*, 5 Exch. 312; *McWilliams Manufacturing Co. v. Blundell*, 22 U. S. Off. Gaz., 177; *Brainard v. Cramme*, *ib.* 769; *Meyer v. Goodyear's India Rubber Co.*, *ib.* 681; *Tyler v. Galloway*, *ib.* 2072; *Ex parte v. Skinner*, 19 *ib.* 662; *West's Appeal*, 2 *ib.* 30; *Estabrook v. Dunbar*, 10 *ib.* 909; *Fetch v. Bragg*, 20 *ib.* 1589; *Blaisdell v. Tufts*, 15 *ib.* 883; *Wilson v. Coon*, 19 *ib.* 482; *Hessin v. Coffin*, 19 Gr. 634; *Wegmann v. Corcoran*, L. R., 13 Ch. D. 66; *Plimpton v. Spiller*, L. R. 6 Ch. D. 286; *Hinks & Son v. Safety Lighting Co.*, L. R.

4 Ch. D. 607; *Prælean v. Sewing Machine Co.*, Bump's Pat. Cas., 108; *Neacy v. Allis*, 22 U. S. Off. Gaz., 1621; *United Telephone Co. v. Harrison*, L. R. 21 Ch. D., 720; *The Cornplanter Patent*, 23 Wall. 181; *Parlean v. Sewing Co.*, 4 Ir., 448; *Furbush v. Cook*, 2 Fish. 668; *Turrill v. Illinois Central R. W. Co.*, 3 Biss. 66, 72; *Neilson v. Betts*, L. R. 5 H. L. 1.

April 5th, 1883. **BOYD, C.**—It is perfectly obvious that the main object of the combination patented by Alexander in his first patent of August, 1880, is to secure defined passages for currents of air between the ice chamber and the provision chamber by means of two flues, the one for the upward passage of the heated air from the lower chamber, and the other for the descending passage of the cooled air along the sides of the ice chamber so that the heated air shall not at any point come in contact with the ice. This advantage is iterated and re-iterated in the patent and accompanying specifications. This benefit is of the essence of the first and third claims for a combination in that patent. The partition of galvanized iron between the upward and downward flues which accomplishes this result is omitted in the refrigerators made by the defendants which are complained of as infringements. The defendants provide a passage for the rise of the heated air at the side of the ice chamber, and that heated air is then discharged directly into the ice chamber, where its tendency will be as I conceive not to strike down along the sides of the ice chamber as suggested by Mr. Ridout, but rather (from the fact of its specific gravity being less than that of the air in the ice chamber) to spread along the top of the ice. As I judge, as it becomes cooled it will take a downward course, not particularly defined into the provision chamber below. I should need better evidence than I find in this case to satisfy me that you have the same action of heated air in both refrigerators whether the partition patented by the plaintiffs as part of their combination is present or absent. If there is a direct turning down-

wards of the current of heated air in the defendant's refrigerator, I see no reason assigned in the evidence why it should pass down close to the sides of the ice chamber instead of in converging lines from the top of the ice chamber to the point of outlet for the cold air in the middle of the refrigerator, between the two water sheds. This would be a very different line of descent from that which is enforced upon the heated air current by the plaintiffs' partition. The plaintiffs are, it strikes me, in this dilemma; either their partition accomplishes a useful result, and is a valuable part of their combination (as it is unquestionably alleged to be in their claim,) or it may be rejected without loss. If the former position is (as I think it is) correct then the defendants have not taken this partition, and so have not used the combination. If the partition is needless then the patent is misleading, because it claims as material, a part which may be rejected without impairing the efficiency of the whole. This would invalidate the patent on the ground of embarrassing the public by claiming that as an essential and important part which was yet useless: *Lewis v. Marling*, 10 B. & C. 22; *Rushton v. Crawley*, L. R. 10 Eq. 527.

But upon the evidence it appears that there is some advantage in keeping the heated air from actual contact with the ice, as you thereby lessen the consumption of the ice, but do not get such a low temperature as when that air is turned in upon the ice. Refrigerators made under this first patent of the plaintiffs might well serve ordinary domestic purposes, but would not answer the demands of meat and provision dealers.

My conclusion is that it is not proved that the defendants have infringed the first claim of the plaintiffs' first patent. Nor do I think an infringement is proved as to the third claim for the reason that an essential part of that combination [*i. e.* the flues and partition] is not used by the defendants though it may be that the small flange on the defendants' water shed is a sort of rudimentary application of the plaintiffs' slanting boards, and effects in a measure

the same results of keeping the currents of air separate by giving a deflecting impulse to the down-going current at that particular point. But the third claim is for an accumulation of ice rack, water-sheds, trough, and slanting boards in combination with the two flues. If the defendants leave out that part relating to flues, they do not take the combination of which it is an essential part by the terms of the claim. As tersely put by Lord Chelmsford in *Harrison v. Anderston Foundry Co.*, L. R. 1 App. Cas., 581; "If a patent is solely for a combination nothing is protected by it, and consequently nothing can be an infringement, but the use of the entire combination."

The second claim in the first patent is thus expressed: "In a refrigerator an open ice rack in combination with a water shed and trough substantially are shewn." This is a different combination from those in the first and third claims, and if less than the whole is sought to be protected as a subordinate combination it must of course be shewn that it is the proper subject of a patent: *Clark v. Adie*, L. R. 10 Ch. 677. I find all the parts of this combination used by the defendants. Their defence is that the claim is bad for want of novelty and utility. I find this combination clearly indicated with a slight variation in the Birdsall patent of October, 1878, (Canada.) Instead of having a trough-shaped as the plaintiffs, Birdsall, has a hopper-shaped bottom, which is just a modification of a trough with a pipe to drain off the water where the four sides of the bottom converge. This bottom is divided into three parts by means of what are called step-like offsets, with narrow openings as a passage for the ice surrounding air into an air space—precisely corresponding in appearance and arrangement with the plaintiffs' two water sheds and intermediate trough. Birdsall's grate, the same as the plaintiff's open ice rack is placed so as to rest in the offsets of the bottom just as the plaintiffs' is placed. Taking a vertical cross-section of Birdsall's plan, it is almost identical in appearance with the sectional appearance of the plaintiffs' model, and I am unable successfully to distinguish

this part of the claim from the corresponding parts in the earlier patent. I am also of opinion that this claim is anticipated in the Stephens patent of March, 1879, (Canada) in which is to be found an identical arrangement of drip shelves, drip troughs, and rack of slats so placed as to secure a circulation of the air. In my judgment the second claim is an old combination, and, therefore, not patentable.

The only remaining question is, as to the sixth claim of the reissued patent of September, 1881, which it is found has been infringed by both defendants. That claim is thus stated in the patent "a warm air passage or passages in combination with the open ice rack, water sheds, and trough." The ice rack in this combination is open at the sides of the ice chamber. The cold air passage in plaintiffs' fifth claim is not to be considered in dealing with the sixth claim. Abstracting this outlet, then the action of the heated air rising through the passage at the sides of the refrigerator discharging on top of the ice and finding its way, when cooled, to the centre of the ice chamber where the spaces between the water sheds and the trough afford an outlet for it into the provision chamber is the same substantially as the combination of parts and the motion of air produced thereby in the cooler exhibited by the defendants and marked "G." This combination is perfectly intelligible, and works well without employing the cold air passage G. which is only intended to provide an additional passage for the descending currents. That this is a useful combination is demonstrated by the fact that the defendants have substantially copied it in their model G. It is not the same as any combination in the first patent, because the open side racks and especially the absence of the partition which keeps the air from the ice constitute material points of difference. I find no evidence of any such combination being in use before. The Murphy Patent is distinguishable because it has a solid bottom.

Apart from the defences of want of novelty and want of utility, the special issues raised by the defence

as to the infringement of the reissued patent are in the 13th and 14th paragraphs, and to this effect, that the patent of September 18th, 1881, appears to contain claims and combinations not patented or applied for in the application or in the patent of June 9th, 1881, and charging it to be void on this ground, and further that certain of the claims in the patent of September are combinations without the alleged invention claimed and patented by the patent of June, and were not proper subjects for a reissue, and on this ground void. The questions thus presented are purely of law, and amount shortly to this, that the reissue is invalid because containing combinations not in the surrendered patent or application therefor. It was not argued before us that this was not a novel combination, nor that the patentee was not the inventor thereof, nor that the United States decisions were not correct expositions of patent legislation, which is the original of our law. On the contrary, both parties based themselves on United States authorities alone. The comparison of the drawings and papers and patents shew that the sixth combination in question was displayed in the drawings, described in the application, but not separated from the other parts of the description, and made the subject of a distinct claim, so as to be protected by the first patent. The neat point thus raised is as to the jurisdiction of the Commissioner of Patents to grant a reissue embracing a combination thus manifested but not claimed in the surrendered patent. The evidence afforded by the reissue itself shows that all the conditions of the statute have been complied with to the satisfaction of that officer. It is there recited in the terms of the statute that the Commissioner of Patents deems that the patent of June is defective and inoperative by reason of insufficient description, and that the error arose from inadvertence accident or mistake, without any fraudulent or deceptive intention. No issue is raised as to any of these matters of fact, and no issue is raised as to the rights of other parties intervening, or that there was any unreasonable delay in applying for a rectification at the hands of the

commissioner, or that the reissue was not for the same invention as the original patent. It is not to be assumed without pleading, and without evidence, and in the face of a contrary finding upon the patent itself that the delay from June to September of the same year was improper and unjustifiable. Yet, as I read the more recent United States decisions, this is the only ground upon which the Courts could or should interfere with this reissued patent. If the delay in surrendering and procuring a reissue was not unreasonable then otherwise there was jurisdiction under the Statute to do what was done. If there had been any dispute as to time, I may just mention that it appears that the application for the reissued patent was received by the patent office on August 23rd by the stamp on its face, and there may have been delay in the patentee's receipt of the patent dated June 9th, so as to reduce the interval very considerably. However this question of fact is not now open for discussion. It is to be assumed that the delay was properly accounted for to the officer, and was not in itself unreasonable: *Bump on Patents*, pp. 178, 179.

One of the latest cases to which we were referred by the defendants *New v. Warren*, 22 U. S. Off. Gaz., 587, (July 22nd, 1883), recognizes the power of the commissioner to reissue, and include therein a claim which was described in the original, but not claimed or patented there. Wheeler, J., there says: "The claim of division B., is entirely new in the reissue. The description on which it was founded was in the original, and the process, if patentable at all, might have been claimed there; but it was not. According to numerous former cases it might be claimed in the reissue as well. As it is, however, it comes within the principle of *Miller v. Bridgeport Brass Co.*, 21 U. S. Off. Gaz. 201, and *Campbell v. James*, *ib.* 337, and cannot be upheld now." An examination of these cases cited shews that the reissue could not be upheld under the particular circumstances, because there had been too great a delay in applying for the rectification. In

New v. Warren, the original was dated February 10th, 1874, the reissue was dated October, 1875. In *Miller v. Bridgport Brass Co.*, the original was October 16th, 1860, and was twice reissued, first in May, 1873, and again in January, 1876. The second reissue was the one there in litigation. Mr. Justice Bradley, at p. 352, says: "If a patentee who has no corrections to suggest in his specification, except to make his claim broader and more comprehensive, uses due diligence in returning to the Patent Office and says, 'I omitted this, or' 'my solicitor did not understand that,' his application may be entertained, and, on a proper showing, correction may be made * * Nothing but a clear mistake or inadvertence, and a speedy application for its correction is admissible when it is sought merely to enlarge the claim." * * Then at the foot of page 354 the learned Judge says, "It was not the special purpose of the legislation on this subject to authorize the surrender of patents for the purpose of reissuing them with broader and more comprehensive claims, although under the general terms of the law, such a reissue may be made where it clearly appears that an actual mistake has inadvertently been made." * * And at the foot of page 355, "The correction of a patent by means of a reissue where it is invalid or inoperative for want of a full and clear description of the invention cannot be attended with such injurious results as follow from the enlargement of the claim; and hence a reissue may be proper in such cases, though a longer period has elapsed since the issue of the original patent. But in reference to reissues made for the purpose of enlarging the scope of the patent, the rule of *laches* should be strictly applied, and no one should be relieved who has slept upon his rights, and has thus led the public to rely on the implied disclaimer involved in the terms of the original patent; and when this is a matter apparent on the face of the instrument upon a mere comparison of the original patent with the reissue, it is competent for the Courts to decide whether the delay was unreasonable, and whether the reissue was therefore

I am able to discover from these U. S. patents and the evidence of the skilled witnesses, no one of the combinations claimed by the plaintiffs was the subject of any one of these patents; and I think the defence has failed to shew any anticipation of the inventions, or any of them, in the plaintiffs' patents; and I am of the opinion that the inventions in question must, for the purposes of this suit, be considered new inventions.

There remains the question as to whether or not the alleged infringements, or any of them, took place.

There were models of the refrigerators manufactured by the plaintiffs according to their respective patents. These were known in the evidence as models H and I; the model H being a model of the refrigerator manufactured according to the first patent, and the model I being a model of a refrigerator manufactured according to the reissued patent. No question was raised as to the correctness of these models, or of the others that I have mentioned.

After a comparison of these models, made as carefully as I am capable of doing it, and after reviewing the evidence of the witnesses on the subject, and having had the benefit of the arguments and explanations of counsel who seemed to have given very great attention indeed to the subject, I am of the opinion that it has been shewn that the first and second claims in the plaintiffs' first patent have been infringed by the manufacture of the refrigerator made by the defendant Malcolm, and also by the manufacture of the refrigerator made by the defendants Malcolm and Macdonald. I am also of the opinion that the third claim in the plaintiffs' first patent has been infringed by the manufacture of the refrigerator made by the defendant Malcolm. I am also of the opinion that the sixth claim in the plaintiffs' reissued patent has been infringed by the manufacture of the refrigerator made by the defendants Malcolm and Macdonald.

I am of the opinion that the fifth claim in the plaintiffs' reissued patent has not been shewn to have been infringed either by the manufacture of the refrigerator made by

the defendant Malcolm, or of that made by the defendants Malcolm & Macdonald. I do not find the cold air passage G, shewn in the drawing attached to this patent and found in the models of the refrigerator manufactured by the plaintiffs according to this patent, delivering the air into the chamber below the watershed, in either of the models of the refrigerators made by the defendants. In both the models of the refrigerators manufactured by the defendants the cold air passing downwards is first delivered into a different chamber, the one above the watershed. The location of the cold air passage G, shewn on the drawings, and there indicated not only by the letter but also by the bended arrows, seems to me quite unmistakable, and the passage is not found in that location in the models of the refrigerators made by the defendants, or either of them.

There was much contention as to the alleged infringement of claim No. 3 of the plaintiffs' first patents, one of the chief grounds of such contention being as to the alleged absence of what are called the "slanting boards H," in that claim, but after considering the evidence of Ridout, called by the plaintiffs, and of Sangster, called by the defendants, as well as the other evidence on the subject, and again examining the models, I am of the opinion that it is shewn that the projection on the lower side of what is called the "water-shed" in the refrigerator manufactured by the defendant Malcolm, is a contrivance which is a colorable imitation of the slanting boards, and performs in a manner the same office. Sangster does not wholly contradict this. Ridout says it is the fact, and such is my conclusion.

As to the point so much contended for respecting the flue known in the evidence G g, I adopted, after much anxiety, the view stated in the evidence of Mr. Ridout. The effect is, that the defendants cannot manufacture either of the refrigerators which was being manufactured by them.

The plaintiffs are entitled to the injunction. They are also entitled to an account if they desire it, and to the costs of suit.

is construed as embracing both claim and description: *Wilson v. Coon*, 18 Blatch. 535. So that a reissue is permissible whenever the claim is *defective*, i.e., by the patentee not claiming all of his invention that might be claimed under the description. As put by Blatchford, J., (who has since been elevated to the Supreme Court of the United States,) in the case last cited, at p. 536, "a patentee may, in the description and claim in his original patent, erroneously set forth, as his idea of his invention, something far short of his real invention, yet his real invention may be fully described and shewn in the drawings and model. Such a case is a proper one for reissue."

If the description of the sub-combination is found in the original specifications, it does not matter in my opinion whether that is disclosed there with a view to shew the make up and construction of the larger combination actually claimed and patented, or with a view to indicate that it is a part of the invention which is for some reason afterwards not claimed and patented by itself; in either aspect the materials are found in the original specifications, and the new thing is disclosed (whether claimed as new or not,) which justify an amendment by claiming as an invention the sub-combination, if such be the fact, and the commissioner is satisfied that a case is made out for rectification and reissue: *Potter v. Stewart*, 19 U. S. Off. Gaz. 997; *S. C. Dec. Com. Pat.* 1881, p. 193, (per Blatchford, J., at p. 104.)

The conclusion derived from a great number of authorities is thus stated in *Dederick v. Cassell*, Dec. C. P. 1881, p. 415, 20 U. S. Off. Gaz. 1233: "While language may be found in *Gill v. Wells*, 22 Wall. 1, and a few other cases, which standing alone, might justify a belief that where a general combination embraces minor subordinate combinations not claimed in the original patent, a subsequent introduction of claims for the latter is invalid, such a conclusion, however, cannot be reconciled with what has been decided elsewhere both before and since." See also *Selden v. Stockwell Co.*, Dec. Com. Pat. 1881, p. 431.

As put by Mr. Justice Bradley, in *The Powder Co. v. The*

Powder Works, 98 U. S. R. 126, in a reissue, the danger to be provided against is the temptation to amend a patent so as to cover improvements which might have come into use, or might have been invented by others *after* its issue. In the case in hand, the position, and form, and functional effect (in promoting circulation of the air between the chambers) of the parts embraced in the 6th claim of the reissue are found and operate precisely as described and delineated in the original. As far back as 1854 the Supreme Court of the United States held, in *Buttin v. Taggart*, 17 How. 74, on issues directly raising the point that matters which were inventions shewn, but not claimed, in the original could be embraced in the claims of a reissue. There the original claimed as the invention the combination of a coal breaker and screen. A reissue was upheld by which protection was claimed for the construction of the rollers forming the coal-breaker, the screen, and therefore the combination being entirely omitted. The Court there referred to cases shewing that there was power in the government (apart from the statute authorizing a reissue) to reform a defective patent so as to validate and effectuate the contract with the public by which the individual, in return for his full disclosure, secures a limited monopoly of the benefits of his invention.

Seymour v. Osborne, 11 Wall. 516 (the leading case on the subject of reissues), determined that the claim of a reissue might be enlarged to cover anything described, suggested, or substantially indicated in the original specifications, drawings, or patent-office model. In *Klein v. Russell*, 19 Wall. 433, certain canons of decision were affirmed as to reissues, of which one is that a reissue is *prima facie* to be presumed to be for the same invention as the original; and the second, that the Courts should proceed in a liberal spirit so as to sustain, if possible, the patent and the construction claimed by the patentee both in an original and a reissue. As felicitously put by Mr. Justice Nelson, in *LeRoy v. Tutham*, 14 How. at p. 182, "The Court should look through the forms of expression

and discover, if it can, the real thing invented, with a view of giving the patentee that protection which was held out to him as the inducement to perfect his invention and disclose it to the public." It is easy to perceive how the patentee may, in the present case, have erred through inadvertence in not claiming his sub-combination in the original patent. He supposed, or was told that the manner of conducting the heated air into the ice chamber and its exit through the openings at the middle part of the bottom of that chamber was covered by his first patent of 1880. That turned out to be wrong; but why should he not be allowed to have this blunder remedied by a reissue? The whole action of the patentee and the department is explicable in a very simple and obvious way, and we should not assume anything against what has been done in order to secure to the patentee his rights of property in this particular patent or sub-combination. The patentee was directing his attention to the one thing, *i.e.*, to construct a perfectly ventilated refrigerator, and all the parts are in furtherance of this one end. The whole combination patented by the surrendered patent grew out of the union of parts described in the specifications, of which an important one is the sub-combination secured by the reissue. To borrow the expression of Lord Cairns, in *Clark v. Adie*, L. R. 2 App. Cas. 321, there is here "a minor invention of a certain number of parts, forming a novel combination, which is a subordinate integer in the larger invention." This distinguishes the case from the *Powder Co. v. Powder Works*, 98 U. S. 126; for there the first patent was for a process or mode of exploding nitro-glycerine, and the reissue was for the manufacture of a compound of nitro-glycerine with other explosives. Mr. Justice Bradley, at p. 137, indicates the objection to supporting the reissue thus: "The processes which the patentee described as his invention in the original patent had no connection with the mixtures or compounds which are patented in the reissued patent. They were not processes for making those compounds, and in describing them the compounds were not mentioned. The

invention of one did not involve the invention of the other. The two inventions might have been made by different persons and at different times "

This is more like the case of *Miller v. Brass Co.*, *supra*, where it is said at p. 362, "The claim of a specific device or combination and an omission to claim other devices or combinations apparent on the face of the patent are in law a dedication to the public of that which is not claimed." That presumption of dedication, however, is rebutted here by the prompt surrender and reissue of the patent in question. The same appears by *Bantz v. Frantz*, 105 U.S. R. 160, where the original patent was only meant to cover a combination of several contrivances, therein described, and not to cover the several elements of the combination as distinct inventions. Upon this Mr. Justice Woods says, at p. 165, "If the specification in the original patent was defective or insufficient in claiming a combination of several devices instead of making a distinct claim for every device which entered into the combination, the fact was instantly discernible, even to an unpractised eye, as soon as the patent was read. Therefore, if any correction was desired it should have been applied for immediately; the right to have the correction made was abandoned and lost by unreasonable delay." The delay in that case was over thirteen years. The same law is enunciated by Mr. Justice Bradley in *Matthews v. Machine Co.*, 105 U. S. 57, 58.

For these reasons I agree with the judgment appealed from that there has been an infringement of the 6th claim of the reissued patent which should be prevented by this Court. I also agree that the reissued patent is a valid instrument as against the objections raised in the pleadings, and I do not propose to discuss or interfere with the finding on the facts that the defendants were jointly interested in the particular refrigerator which has infringed this sixth claim.

Success being divided on the appeal and on the action, there should be no costs to either party.

PROUDFOOT, J.—I have nothing to add to what the Chancellor has said as to the alleged infringements of the patent of 1880.

The question is different in regard to the patent of June, 1881, and the reissue of it in September, 1881.

In 1878, Murphy and Trebilcock obtained a patent for an improved refrigerator, which among other things embraced flues for carrying the warm air from the cooling room to the ice chamber to be re-cooled and returned again,—air passages formed under the metal floor lining leading to the cooling chamber,—rack along the sides of the ice chamber and the cold air flue leading to the cooling room.

Alexander's patent of 1880 was for a combination of several parts, all of which were old, by which he cooled the heated air by passing it along the side of the ice chamber and carefully excluded it from coming in contact with the ice itself. And we have just held that the defendants have not infringed this patent.

Alexander's patent of June, 1881, purports in the specification to be for "certain new and useful improvements in refrigerators," and the invention is said to consist "in a flue located on the back of the refrigerator and leading from the bottom of the cooling chamber to and out of the top of the refrigerator, the bottom of the cooling chamber being made to slant from the front of the box to the rear where the ventilating flue opens out. Near the top of the refrigerator are air holes made through the outside skin to the warm air passage leading into the ice chamber substantially as and for the purposes hereafter explained. In the drawing figure 1 is a front section of my improved refrigerator and figure 2 a cross section of the same. My invention relates to that class of refrigerators for which I obtained a patent last year." The drawings attached to the specification which he proceeds to describe do not represent the refrigerator he had patented the previous year. In the patent of 1880 the warm air was not thrown into the ice chamber, in these drawings it appears to be so thrown. The only claim made in his specification is "in a refrigerator

having cold air passages for conducting the cold air from the ice chamber to the cooling chamber, and separate air passages for re-conducting it into the ice chamber, the combination of a vertical ventilating flue leading from a point at or near the bottom of the cooling chamber to a point outside the refrigerator at or near its top."

He describes the effect of this ventilating flue as follows: "The vitiated gas thrown off by the articles in the cooling chamber B, being heavier than the purer air, will naturally fall to the bottom of the chamber, when it is immediately drawn by the action of the ventilating flue H, and ascends upwardly, where it is discharged out of the top of the refrigerator." I need not stop to inquire whether the inventor's design would be accomplished by this arrangement. What he has patented is this foul air flue in combination with existing refrigerators which he erroneously describes as his invention. He makes no claim to the combination of the hot air and cold air flues.

He surrenders this patent and obtains a reissue in September, 1881, in which the diagrams attached to the specification are precisely similar to those attached to the patent of June, and makes no fewer than eight claims for various combinations of flues, racks, &c., but it is only with the sixth we have now to do, expressed to be "in a warm air passage or passages, D, in combination, with the open ice rack F, and water sheds C and trough C." None of these separate things are new; it is only the combination that is claimed. And the question is, whether this is "an amended description and specification" to correct one "inoperative by reason of defective or insufficient description and specification." The specification and the diagrams in both are identical; the only difference is the claims. In the one the patentee claims simply the foul air flue in combination with the refrigerator, in the other he claims that and eight other combinations.

The fact that these combinations might each be the subject of a separate patent does not remove the difficulty,

for the effect of a reissue and of an original patent is different. The danger to be provided against in a reissue is the temptation to amend a patent so as to cover improvements which might have come into use, or might have been invented by others after its issue. (*The Powder Company v. The Powder Works*, 98 U. S. R. 138.) The fact that the United States patent law contains a clause that "no new matter shall be introduced into the specification," does not affect their decisions as to this case, for no new matter is introduced here, only the claims are increased in numbers. In other respects the patent laws of the United States and Canada are substantially the same, and we were referred to many cases before the Courts of the United States as giving the true interpretation of these laws. I have read most of them, and given them that attention which is due to the eminent men who have presided, and do preside, over these Courts. The recent discussions in American legal publications (*American Law Review*, November, 1881, February, 1882, April, 1882, and September, 1882), however, show that there is great uncertainty among the members of the legal profession as to the effect of the decisions of the Supreme Court. On the one hand it is contended that the tendency of the recent decisions is to limit reissues to cases of accidental mistake; on the other hand, that they permit a patentee to amend his specification and claims by re-describing his invention, and including in his claims not only what was well described before, but whatever else was suggested or substantially indicated in the specification or drawings which properly belonged to the invention as actually made and perfected. At all events, these discussions show the law there to be in a somewhat doubtful condition.

In one case in Michigan, (*Kells v. McKenzie*, 20 U. S. Off. Gaz. 1663) Judge Brown uses this language, at p. 1665, as a summary of the cases: "Now if it be true that the patentee may claim in his re-issue anything which was suggested in the drawings of his original patent, this

reissue is valid: but if he is confined to what he declares is his invention in his original patent, then it is invalid," and he held the the expanded claims invalid.

The plaintiffs relied much on the case of *Seymour v. Osborne*, 11 Wall. 516, where the Court says, at page 544: "Power is unquestionably conferred upon the commissioner to allow the specification to be amended if the patent is inoperative or invalid, and in that event to issue the patent in proper form; and he may, doubtless, under that authority, allow the patentee to re-describe his invention, and to include in the description and claims of the patent, not only what was well described before, but whatever else was suggested or substantially indicated in the specification or drawings which properly belonged to the invention as actually made and perfected," and again at page 544: "Reissued patents must by the express words of the statute authorizing the same, be *for the same invention*, and consequently where it appears on a comparison of the two instruments, as matter of law, that the reissued patent is not for the same invention as that embraced and secured in the original patent, the reissued patent is invalid, as that state of facts shows that the commissioner, in granting the new patent, exceeded his jurisdiction."

Much stress was laid upon the clause that the patentee might "include in the description and claims of his patent not only what was well described before, but whatever else was suggested or substantially indicated in the specifications or drawings." But taken in connection with the rest of the paragraphs quoted above, I am not indisposed to adopt the language of the court as a proper interpretation of the law as applicable to this case. For the whole is qualified by the phrase that the reissue must be for the same invention, and these indications and suggestions are to be such as properly belonged to the invention as actually made and perfected.

Other cases in the Supreme Court of the United States limit the reissue also to amendments to make the specifi-

cation more clear and distinct, but it must be for the same invention, and they perhaps modify somewhat the wider language of *Seymour v. Osborne*, 11 Wall. 516.

In *Russell v. Dodge*, 93 U. S. R. 460, Mr. Justice Field in delivering the judgment of the Court says: (p. 463) "A reissue could only be had where the original patent was inoperative or invalid, by reason of a defective or insufficient description or specification, or where the claim of the patentee exceeded his right; and then only in case the error committed had arisen from the causes stated. And as a reissue could only be granted for the same invention embraced by the original patent, the specification could not be substantially changed either by the addition of new matter, or the omission of important particulars, so as to enlarge the scope of the invention as originally claimed. * * The object of the law was to enable patentees to remedy accidental mistakes, and the law was perverted when any other end was secured by the reissue. * * The description given of the process claimed was, as stated by the patentee, full, clear, and exact, and the claim covered the specification."

In the case of *Powder Co. v. Powder Works*, 98 U. S. R. 126, Mr. Justice Bradley, in delivering the judgment of the Court, says, at p. 148: "The specification may be amended so as to make it more clear and distinct; the claim may be modified so as to make it more conformable to the exact rights of the patentee, but the invention must be the same.

The *Cornplanter* patent case (23 Wall. 181) is not calculated to throw much light on this question, as the reissues were in several distinct patents, and besides the decision was dissented from by three out of eight of the judges.

Miller v. Brass Co., 104 U. S. R. 350, is another decision of the Supreme Court, where Mr. Justice Bradley says, at p. 353: "It will be observed that while the law authorizes a reissue when the patentee has claimed too much, so as to enable him to contract his claim, it does not, in terms authorize a reissue to enable him expand his claim. The

great object of the law of reissues seems to have been to enable a patentee to make the description of his invention more clear, plain, and specific." He then traces the history, of the changes of the law as to patents, and proceeds, at the foot of p. 354: "At all events we think it clear that it was not the special purpose of the legislation on this subject to authorize the surrender of patents for the purpose of reissuing them with broader and more comprehensive claims, although, under the general terms of the law, such a reissue may be made where it clearly appears that an actual mistake has inadvertently been made. But by a curious misapplication of the law it has come to be principally resorted to for the purpose of enlarging and expanding patent claims. And the evils which have grown from the practice have assumed large proportions."

I do not assent to this construction of the statute, that it authorizes a reissue "with broader and more comprehensive claims," if by that be meant that it authorizes a reissue with a claim not in the original patent at all. The 14th section of the Act of 1872, 35 Vic. ch. 26, D., requires the specification to state clearly and distinctly the contrivance and things which the inventor claims as new, and for the use of which he claims an exclusive property and privilege. A claim is therefore an essential part of the specification. But it does not seem to me enough to entitle the inventor to a reissue, to allege that all the elements of his new claim may be found in the specification. The 19th section authorizes a reissue when the patent is deemed defective or inoperative by reason of insufficient description or specification, or by reason of the patentee claiming more than he had a right to claim as new, and the error has arisen from inadvertence, accident, or mistake. This, in my judgment, does not authorize a reissue for a new claim.

That a reissue may be had, if the claim be so imperfectly described through error or mistake as not to cover the invention, may be conceded; but here there is no imperfect claim, it has a distinct object in view and effects that object, it describes a foul air passage and claims it in

combination with the refrigerator, the addition of a claim for a warm air passage, does not remedy any defect in the original claim, it is an addition of an entirely new device or combination.

The language of Mr. Justice Bradley is perhaps susceptible of a limitation to broadening the original claim. But it is plain that he represents the course of decision as in an uncertain, or transition state, resulting in a curious misapplication of the law. And he sets about limiting it: "Reissues for the enlargement of claims should be the exception and not the rule." And he lays hold of delay in the application for a re-issue as a reason for treating it as void.

The decisions in this country have not been so numerous as in the United States, and they have not yet reached the point of justifying a misapplication of the law. I think we should give effect to what appears to me to be the plain language of the statute, and not allow ourselves to be drawn in the wake of decisions that misconstrue it and misapply it. The earlier decisions in the United States Courts seem to me more in conformity with the language and intention of the Act.

In *James v. Campbell*, 104 U. S. R. 356, the same Judge (Bradley) in again dealing with the subject of reissues, at page 378 states the law to be, what I consider, more in accordance with the language and intentions of the Act: "Having obtained a patent for his specific device and combination if he afterward wished to claim the general combination, and had not already abandoned it by taking a narrower patent, he was bound to make a new application for that purpose. Patentees avoid doing this when they can, and seek to embrace additional matters in a reissue, in order to supersede and get possession of the rights, which the public, by lapse of time or other cause, have acquired in the meantime."

Bantz v. Frantz, 105 U. S. R. 160, is one of the more recent cases, in which it was held that the reissue was void, because the claim of the original patent was meant

to cover a combination of the several contrivances therein described, and not to cover the several elements of the combination as distinct inventions, which were included in the reissue. The claim for the elements would have been void if made in the original patent, as at least one of them was covered by a prior patent. But the Court seem to have thought that, but for delay, the reissue might have included the elements if the patentee were the inventor, and approves of *Miller v. The Brass Co.*, *supra*.

Wilson v. Coon, 19 U. S. Off. Gaz. 482; *New v. Warren*, 22 *ib.* 587; *Meyer v. Goodyear India Rubber Co.* *ib.* 31; *Brainard v. Cramme*, *ib.* 769; and *Tyler v. Galloway*, *ib.* 20, 72, may be referred to as recent instances where the United States Courts seem to recognize the right to broaden the claims in a manner that does not appear to me in accordance with the law, and which I decline to follow.

I do not think that the provision in the Act of 1872, sec. 6, enabling an inventor to obtain a patent for an article not in public use or on sale more than a year previously, should have any influence in determining the issue in this case, in which only about two months elapsed between the patent and the reissue; because that only applies to an inventor of a machine not known or used by others before his invention. Now it is quite possible that in the interval of two months, or for years before, this new invention or combination may have been known and used, and it ought only to be protected, if protected at all, after all the formalities and safeguards have been observed for the issue of an original patent.

I think the bill should be dismissed.

A. H. F. L.

[CHANCERY DIVISION.]

WHITNEY V. TOBY ET AL.

*Fraudulent preference—Pressure—Originator of scheme of preference—
R. S. O. c. 118.*

L. being in insolvent circumstances, went to A., and asked A. to procure discounts for him, which A. agreed to do on condition that he should retain a part of the proceeds of the paper which should be brought to him, and apply it to the indebtedness of L. to him, and to several other creditors, whom he, A., represented. This was agreed to and acted on, and certain securities were thus transferred to A. by L., L., also at the same time, requested A. to sell some leather for him, which A. agreed to do on similar terms as to the application of the proceeds, and the leather was duly transferred to A. who was aware of L.'s circumstances.

On action being brought impeaching the transfer of the securities as a fraudulent preference.

Held, that inasmuch as the idea of the transfer as made was proposed by A., and he and not L., was the originator of the scheme, whereby he, and the creditors represented by him were preferred, the transfers were not made "voluntarily," and "with intent" to give such creditors a preference over the other creditors within the meaning of the statute, and could not be set aside.

THE plaintiffs in this suit were N. S. Whitney, J. H. Wardlaw, and J. M. Whitney, carrying on business under the firm name of Whitney, Wardlaw & Co., C. King and J. King, carrying on business under the name of King Bro., H. J. Fisk, R. O. Montgomery, B. J. Pattener, and R. B. Coulson. All of them were wholesale leather merchants, carrying on business in various towns in Canada, except King Bros., who were tanners. They filed the bill herein against W. Toby and J. Cassels, who were tanners, carrying on business together at the Town of Collingwood under the firm name of Warren Toby & Co., and against D. W. Alexander, who was a wholesale leather merchant, carrying on business in Toronto.

By their bill the plaintiffs prayed that a certain transfer of goods and chattels and effects, and a certain delivery and making over of bills, bonds, notes and securities might be declared null and void as against them, and that the same might be set aside, and that it might be declared that the said goods, chattels, and effects, and the said bills, bonds, notes, and securities, or their proceeds, were applicable to satisfy certain executions of the plaintiffs; that the defendants might be ordered to deliver up such goods,

chattels, and effects, and such bills, bonds, notes, and securities, or if not able to deliver the same, to account for their proceeds, or their value; that the defendants might be restrained by the order and injunction of this Court from alienating, disposing of, or in any way incumbering such goods, chattels, and effects, or the said bills, bonds, notes, and securities, or any of them; and, for their costs of this suit, all proper directions and general relief.

The circumstances of the case are fully stated in the judgment.

The case was heard at Toronto, on December 6th, 7th, 8th, 9th, and 10th, 1881, before Ferguson, J.

S. H. Blake, Q. C., and *Thompson*, for the plaintiffs. This case is clearly within the common sense of the statute, R. S. O. 118; *Merchants' Bank v. Clarke*, 18 Gr. 594; *Morton v. Nihan*, 5 A. R. 28; *Gottwalls v. Mulholland*, 15 C. P. 62, S. C. in App. 3 E. & A. 194; *The Bank of Montreal v. McTavish*, 13 Gr. 395; *Allan v. Clarkson*, 17 Gr. 570.

J. MacLennan, Q. C., for the defendant, *D. W. Alexander*. All the cases down to *Davidson v. Ross*, 24 Gr. 22, shew that for a transaction to come within the statute, it must originate in the voluntary act of the debtor. If Alexander had gone even after the insolvency was complete and known, and demanded payment or security, the transaction would not come within the statute. See *Newton v. The Ontario Bank*, 15 Gr. 283; *Clemmow v. Converse*, 16 Gr. 547; *Keays v. Brown*, 22 Gr. 10; *McFarlane v. Macdonald*, 21 Gr. 319; *Ex parte Topham*, *In re Walker*, L. R. 8 Ch. 619; *In re Beverley*, 4 Ir. R. Eq. 198; *Ex parte Jeffery*, *In re Hawes*, L. R. 7 Eq. 61, S. C. in App. 9 Ch. 144; *Ex parte Butcher*, L. R. 9 Ch. 595, S. C. in App. L. R. 7 H. L. 839; *Ex parte Craven*, L. R. 10 Eq. 648; *Tuer v. Harrison*, 14 C. P. 449; *McWhirter v. Thorne*, 19 C. P. 303. Moreover the assignor here was not unable to pay his debts in full. If Alexander schemed and paid wages to keep the business going until he could get the amount of the accounts represented by

him out of it, this was not voluntary action on Large's part. There was pressure on the creditors' part. I refer to *The Bank of Australia v. Harris*, 15 Moo. P. C. 97; *Munes v. Carter*, L. R. 1 C. P. 342; *Ex parte Topham*, L. R. 8 Ch. 619; *Ex parte Bolland*, L. R. 7 Ch. 24; *Butcher v. Stead*, L. R. 7 H. L. 839; *Tomkinz v. Jaffery*, L. R. 3 App. Ca. 213; *Vacher v. Cokes*, 1 B. & Ad. 145.

D. McCarthy, Q. C., and *Foster*, for the other defendants. The burden of proof is on the plaintiffs, and the evidence must be clear and conclusive. The circumstances here lead to the conclusion that the transaction was *bonâ fide*. Moreover, to make the transaction impeachable, the preference must be the sole object of the debtor: *Brown v. Kempton*, 19 L. J. C. P. 169. I refer also to *Bittlestone v. Cooke*, 6 El. & B. 296; *Royal v. Bank*, 17 Gr. 56; *Sutherland v. Nixon*, 21 U.C. R. 629; *Newton v. Ontario Bank*, 15 Gr. 289; *Ex parte Tempest*, L. R. 6 Ch. 70; *Strachan v. Barton*, 11 Ex. 647; *Churcher v. Johnston*, 34 U. C. R. 528; *Nelles v. Bank of Montreal*, 24 Gr. 449; *Kerr on Fraud*, 2nd. ed. p. 316.

S. H. Blake, Q. C., in reply. As to what constitutes insolvent circumstances, I refer to *Wharton's Law Dictionary*, sub voc., "Insolvent;" *Bouvier's Law Dictionary*, sub voc. "Insolvency;" *Bayley v. Scofield*, 1 M. & S. 338; *Shone v. Lucas*, 3 D. & R. 218. If a demand is made and not answered, that is evidence of insolvency; and the abstraction of goods at such a time as in this case, casts the burden on the defendants to explain and show fully how it came about. See *Rex v. Dixon*, 3 M. & S. 11. A creditor without a judgment may attack a transfer as a fraudulent preference: *Longeway v. Mitchell*, L. R. 17 Ch. 190; *Reese River Silver Mining Co. v. Smith*, L. R. 4 H. L. 64. As to *Davidson v. Ross*, *supra*, that deals with more than the section of the statute. As to pressure, there can be no pressure where there is no power in the hand of the party who presses. And the evidence here shows there was no pressure. The money paid by Alexander was not for the purposes of the business, but only to squeeze the whole of

the orange. I also refer to *McEddie v. Watt*, 17 C. L. J. 473; *Labatt v. Bixel*, 28 Gr. 593; *Ex parte Fisher*, L. R. 7 Ch. 636; *Sutherland v. Nixon*, 21 U. C. R. 629; *Risk v. Sleeman*, 21 Gr. 250; *Suter v. The Merchants Bank*, 24 Gr. 370; *Newton v. Ontario Bank*, 13 Gr. 652, *S. C.* in App. 15 Gr. 283; *Nelles v. Paul*, 4 A. R. 1; *McMaster v. Clare*, 7 Gr. 550; *Smith v. Pilgrim*, L. R. 2 Ch. D. 127; *Ex parte Halliday*, L. R. 8 Ch. 283; *Gordon v. Young*, 12 Gr. 318; *Robson on Bankruptcy*, 2nd ed., p. 135.

September 15th, 1882. FERGUSON, J.—The plaintiffs (Whitney, Wardlaw & Co., King Bros., Fisk, Montgomery, and Bethune,) are respectively execution creditors of one Large (who carried on business under the name of Large & Co., in Toronto), who have their several executions in the hands of the sheriff unsatisfied, and by their bill they say that at different times during the months of December and January last, Large being then in insolvent circumstances, unable to pay his debts in full, and believing himself on the eve of insolvency, made, or caused to be made, transfers to the defendants of certain of his goods, chattels, and effects, and among others a quantity of *sole leather* of the value of \$770, and made over certain bills, bonds, notes and other securities for money, being amongst others the following negotiable papers, namely: A bill of exchange drawn by him (Large) on the firm of Ashplant & Taunton, for \$360.85; a bill of Exchange drawn by him (Large) upon Adams & Benedict for \$70.85; a bill of exchange drawn by him upon one Armstrong, for \$96.48; a bill of exchange drawn by him upon one Wilson for \$60.45; each of such bills being accepted by the persons on whom they were respectively drawn for the price of goods sold by the said Large; also three promissory notes made by the firm of Turner & Co., in favour of himself—Large—for the respective sums of \$225, \$225, and \$225.36, and three promissory notes made by one Daniel McLean in favour of himself, Large, for the sums respectively of \$320, \$320, and \$320.80, all such promissory notes having been

made by the makers of the same for goods sold by the said Large to them respectively, payable to his order, and also a certain order directed to the Imperial Bank of Canada for the payment of moneys due, or to accrue due from the bank to him (Large) with interest, to defeat and delay the creditors of him the said Large, and with intent to give the defendants a preference over the plaintiffs and his other creditors, and charging that the delivery and making over of said bills and notes and securities, and each of them, and the said transfer of goods, is null and void as against the plaintiffs. It is also charged that the defendants conspired to get these goods and securities from Large; but nothing more need be said as to this, for a conspiracy was not proved, and little, if anything, was said about it at the trial. The plaintiffs ask to have these transfers set aside as fraudulent and void under the statute, the moneys realized on the securities, and the value of the goods paid into Court by the defendants, and divided amongst and paid out to the plaintiffs.

The defendants Toby and Cassels have not, nor have either of them, as shewn by their answers, and as was apparent at the trial, much, if any, personal knowledge of the facts relative to the transactions of which complaint is made. The defendant Alexander carried on business in Toronto as a wholesale commission dealer in leather, and as a manufacturer's agent, and he conducted the transactions, the subject of the complaint, partly on his own behalf and partly on behalf of the other defendants who carried on business in Collingwood as tanners or manufacturers of leather, the business carried on by Large being the manufacture of ladies' and children's boots and shoes. He, the defendant Alexander, by his answer admits that in the months of January and December, Large & Co., did transfer to him certain notes and bills of exchange and did deliver to him certain leather, and a certain order upon the Imperial Bank, and I apprehend there is no question as to the identity of the bills, notes, leather, and order mentioned in the bill of complaint, and those intended by

the answer to be admitted, but he says that the transfer and delivery were *bona fide*, and for good consideration, and not for the purpose of hindering, defeating, or delaying the creditors of Large, or of giving him and his co-defendants any preference, &c.

The business conducted by Large had been formerly done by Duncan & Fuller, and afterwards by a firm, Duncan & Co., of this firm Large was a partner, and in June, 1880, he bought out Duncan for \$1,545, or thereabouts, and thereafter carried on the business under the name Large & Co., Duncan, however, remaining in his employment, and so far as appears, his managing man, he, Large, not understanding the business, or at least not understanding it so well as Duncan. Large was indebted to Duncan in this sum, \$1,545, and the firm of Duncan & Co. had borrowed from Large's wife \$2,000, which was also a debt to be paid out of the business. Large, it appears by the evidence, had put about \$3,000 into the business prior to his purchase from Duncan. The business went on, and in September, 1880, Duncan says the first difficulty was found, and he demanded security for the money. A transaction was then made and an agreement, dated back to June, was entered into. By this transaction Duncan became relieved from his liability to Mrs. Large for the \$2,000, and got her endorsement to secure to him the \$1,545. Duncan still continued to manage the business for Large. He says there were difficulties in November, but that they, Large & Co., managed to meet their paper up to December 7th. The banking business of Large & Co. had been done at the Imperial Bank, on the terms that the bank would discount to the extent of 75 cents on the dollar of collaterals—customers' notes—deposited, and at this time, December 7th, the bank had refused to discount any more for the firm. According to one witness the refusal was about the 9th of December. On December 14th a chattel mortgage was given to Duncan to secure the debt to him, which had increased from the \$1,545 to \$2,470. Duncan says this increase took place

by reason of advances by him, and unpaid salary. Duncan says that at this time he felt that the business could not be carried on without more capital, or a partner with money, that they had advertised for a partner with money, but had got none. He also says that he understood from Large that he expected money from England, but none came. Duncan closed the business under the power contained in the chattel mortgage, on December 31st. According to the witness Rudge, who was bookkeeper for Large, and who prepared a statement from the books for him, the liabilities were at the time the business closed—the “suspension” he called it, \$14,817.48, and the assets were at the same time only \$7,964.53, made up as follows:—Stock, \$4,617.48; machinery, \$3,097.05; book debts and collaterals in the hand of the Imperial Bank, \$250. The chattel mortgage to Duncan was upon the stock and machinery, and they were afterwards sold by him for, as he says, \$2,500 or \$2,600. This sale, he thinks, was in February. It was not shewn that any large loss was sustained, or that any peculiar misfortune happened to the business in the month of December, or indeed at any time, although the question was asked. According to the evidence of Rudge, the bookkeeper, the property was transferred to the defendant Alexander between December the 15th and January 3rd, both inclusive; but I do not think a slight difference in the date would be material. Much evidence was given, and there was much contention as to the position of Large during this period.

In the case of *Bayley v. Schofield*, 1 M. & S. at p. 350, Lord Ellenborough said, “by insolvent circumstances is meant that a person is not in a position to pay his debts in the ordinary course as persons carrying on a trade usually do,” and there are other authorities to the same effect. In the case of *Sutherland v. Nixon*, 21 U. C. R. 633, McLean, C. J. said, “but it does not necessarily follow because a man is unable on a particular day to meet his debts and pay them in money, that he is therefore insolvent. A man so situated may have abundance of

means to pay all his obligations on receiving a reasonable notice." In this case it matters not I think which of these views is adopted, for according to either one or the other the finding on the evidence must be, I think, against the solvency of Large during the period referred to. I have examined the many authorities on this part of the case to which I was referred by counsel, and I am of the opinion that Large was during the period mentioned "in insolvent circumstances," and that he was "unable to pay his debts in full," within the meaning of R. S. O. ch. 118, sec. 2. It is plain, it is not denied that the property in question, was in fact during this period transferred, and the next question, the one most strenuously argued by counsel for the defence, is, was this transfer of the property made with intent to defeat, hinder, or delay the creditors of Large, or to give the defendants a preference over the creditors? The argument was chiefly in regard to the alleged intent to give the defendants a preference. The defendant, Alexander's statement of the transactions is shortly this: "Duncan came to me on December 7th about a note of Large's for \$492. He asked me to protect it for them. I said I had no funds. He said he would 'cover me' with customers' notes or cash in a day or two. I gave him a check for the amount and 'drew back,' that is, I drew my own draft on Cassels & Co. at sight. I deposited this and gave the check. The draft created the fund wherewith to cause the check to be honoured, I went to Large two or three days after this and told him that I wanted this matter straightened up according to the agreement. I was put off on the plea of the bank having 'gone back' on them. On December 10th, Duncan came to me with \$241, and wanted me to retire Toby's note for \$541. He wanted me to furnish the difference and take up the note. I took the money, but did not take up the note. I said to him you have not straightened up the other matter. He said they would attend to it in a day or two. I kept the money, and credited Toby & Co. with it. I did not protect the note, and it went to protest. The next day, December

11th, Large came to me, and I discussed matters with him. He wanted me to give him the full proceeds of the discounts I would procure for him. I told him that I would not do so, but that I would procure discounts for him provided the papers suited me, and he would allow me to apply a portion upon the Toby and Cassels indebtedness and all the other indebtedness represented by me. He agreed to my terms. Somebody for Large & Co. brought me on December 15th three unaccepted drafts for \$500 odd. I think it was Duncan or Rudge, the book-keepers. I took the paper and gave them \$275, (produces the receipt for it). I paid this \$275 in pursuance of the arrangement I made with Large on the 11th Toby & Co. got the remainder of the proceeds of the three drafts. Cassels & Co, drew back on me at sight for the \$492, and I paid it. The transaction about the leather was on December 22nd. It was first spoken of a day or two after the other arrangement. Large said they had some sole leather they did not want: that he had got it by mistake; and he asked me to purchase it from him. I declined to do this, but said I would take it and sell it for him and apply it on the accounts represented by me. He agreed to this. I received the leather. It came on the evening of the 21st, but is entered in my book on December 22nd. On December 28th I sold the leather and applied the proceeds as I had agreed to. On December 24th they brought me the Turner notes. I sent them to Toby and I paid Large \$375 in cash. On January 3rd I got the other Turner note and the McLean notes for over \$900. I paid Large \$250 then, \$200 on the 6th, and \$200 on the 7th of January. On January 4th I gave Duncan \$194 on an order from Large. I discounted the McLean notes and applied the proceeds on the Toby & Cassels and my own accounts."

The papers produced, so far as they extend, are corroborative of Alexander's statement. Large is called by the plaintiffs. He does not know the whole of the transactions, for some of them were done by Duncan, who was conducting the business for him. He says: "The arrangement, as I under-

stood, was that Alexander was to discount paper for us and was to retain some to stand against paper given to his customers." In another part he says: "I saw Alexander and made an arrangement with him as to the discounting. He was to discount for us, and to retain enough to pay. I do not know how much I am sure. The money he was to retain was to pay Toby & Cassels notes and his own account. Further on he says: "When I gave the notes and leather to Alexander I did not do it with the design of defrauding any creditor, or with the view of making Alexander any better than any of the other creditors. I did not then think I could go on long. I thought I could postpone the suspension. I saw that I was behind when the stock was taken" (meaning here, I apprehend, the statement made out for him by Rudge), "I saw then that my capital and my wife's capital were gone." In another place he says: "I thought it impossible to get on long by discounting with Alexander, and that some new arrangement must be made. I did not think the business would fail. I expected still to carry on. In December I thought sometimes I would sell out, and sometimes not."

There does not appear to be any very material contradiction of the statement of Alexander in respect of the transactions with him. He was able to speak as to the whole of them, and the witnesses called by the plaintiffs each as to only a part of them. I think it beyond doubt that Alexander was aware that Large was much embarrassed and could not continue the business for any long period. He was told that the bank had declined further discounts. He knew of the chattel mortgage, I apprehend, soon after it was made. He says he heard of it, but that he cannot say exactly when; and Thompson, in his evidence says that when he told him that Large's business had been closed he was surprised and said he had not expected it so soon.

Then were these transfers of property made with the intent of giving these defendants a preference over the other creditors of Large? and first were they voluntarily

made? for if made under "pressure" they would not, as the law stands at present in my opinion be considered to have been made with the intent mentioned in the statute. In considering this question I think the transactions prior to December 11th, mentioned by Alexander, concerning the \$492 note and the \$541 note may be left out of the case, they do not seem to me to have any material bearing on the question. Then on December 11th, it is said an arrangement in regard to discounts was made. Alexander did not go to Large or make any demands upon him so far as appears. Large went to Alexander with his proposal which was that he should get the whole proceeds. Alexander would not do this, but proposed to retain a part of the proceeds of the papers that should be brought to him not stating what part or proportion, and Large consented to this. Alexander does not say what proportion. Large says he did not and does not know what proportion, and Toby says he took Large & Co.'s customers' paper, put it through his bank and gave them just such terms as he pleased. This seems to have been his understanding of the arrangement. Then on December 15th, some one from Large & Co.'s brought Alexander about \$500 of paper, he says. No doubt this was composed of the drafts for \$360.85, \$70.25 and \$96.40 mentioned by Rudge as of the 15th of December, and also mentioned in the bill of complaint, and he, Alexander, simply took the paper and gave \$275, pursuant as he says to the arrangement of the 11th. I need not state again the particulars of the delivery of the leather on December 21st, nor of the transfer and delivery of the part of the Turner notes on the 24th of December, and of the remainder together with the McLean notes on the 3rd of January following.

In the case of *Davidson v. Ross*, 24 Gr., at p. 64, Mr. Justice Patterson says: "I understand the ground of all the decisions respecting 'pressure' to be that a transaction is not *voluntary* when it originates in the will of the creditor, at whose instance it is done, and not in the will of the debtor who only yields to the solicitation of his creditor, and it is

not done *with intent* to prefer, &c., if the motive is to escape the pressure which is exercised, or even to comply with a *bond fide* demand which is made, and not to prefer one creditor to another, even though that may be the necessary and obvious effect of what is done."

And in the same case, in the judgment of the Court below, at page 34, authorities are referred to shewing that "pressure" need be nothing more than a request to which the debtor is supposed reluctantly to yield, and there are many authorities to the same effect. In *Ex parte Craven*, *In re Craven and Marshall*, L. R. 10 Eq. 655, the Chief Judge says: "I am not aware of any authority in which a preference has been held to be fraudulent, unless it has been satisfactorily proved to have been the voluntary act of the debtor." The language of Sir George Mellish, in *Ex parte Topham*, L. R. 8 Ch. 619, is quoted with approbation in this Court, in the case of *McFurline v. McDonald*, 21 Gr., at p. 324. It is this: "So unless it can be made clearly apparent, and to the satisfaction of the Court which has to decide, that the debtor's sole motive was to prefer the creditor paid, to the other creditors, the payment cannot be impeached, even although it be obviously in favour of a creditor. The act of the debtor is alone to be considered; the object and purpose for which the payment is made, can alone be inquired into, and although it is perfectly legitimate, and in all cases requisite, that all the attending circumstances should be completely investigated, yet if the act can be properly referred to some other motive or reason, than that of giving the creditor paid a preference over the other creditors, then I conceive neither the statute nor any principle of law or policy, will justify a Court of law in holding that the payment is fraudulent or void." Reference is also made in the same case to the view of the same Judge as showing that the words, "with the view of giving such creditor a preference over other creditors," have the same meaning as the word, "voluntarily," formerly had.

In the case of *Bank of Montreal v. McTavish*, 13 Gr. at

p. 396, Mowat, V. C., expresses the opinion that it need not be made out that the intent to prefer was the debtor's sole intent, or even principal motive in making the assignment, if it was one intent of the debtor. This appears somewhat at variance with the view expressed by Sir George Mellish, above referred to.

In yielding obedience to what I conceive to be the meaning of the authorities (and there are very many more to the same effect as those to which I have referred, some of them being in bankruptcy and insolvency, but the real point being, as I think, the same), I find myself, I may say, compelled to take what appears to me to be a narrow view of the transaction impeached. When Large went to Alexander to get him to discount or procure discounts for him, he wanted the whole proceeds of the discounts. There was nothing wrong in this. It was Alexander who proposed the mode of preference, and Large, the debtor, yielded to it; and however extraordinary it may appear in itself, it was an idea originating with Alexander. When Large proposed to Alexander to get him to sell the leather he wanted, as the evidence shews, that it should be sold for him, by which I understand, to have it sold, and the proceeds given to him in the usual way in such cases. There was nothing wrong in this. It was Alexander who proposed to sell it, and apply the proceeds in the way in which they were applied. The idea of the preference originated with him, and not with Large. The leather was brought to Alexander in pursuance of an arrangement or plan proposed by him, and that was carried out. From time to time the notes or drafts were brought or sent to Alexander, pursuant to a mode or scheme devised and proposed by him, and they were dealt with according to that scheme, and even at the last, and after Large's business had been closed by the chattel mortgage, the notes were given over to Alexander, pursuant to the same scheme. Large does not seem to have been the originator of any scheme or design to prefer the defendants or any of them. Large did, however, that, the necessary and obvious effect and conse-

quence of which was to prefer the defendants; and if I were at liberty to make use of the expression of the then Chancellor, in the case of *McMaster v. Clare*, 7 Gr. at p. 558, though not necessary for the decision of the case then before him, I should be glad to impute the intent to him, but I cannot, as I think I am forbidden by the authorities so to do.

The conclusion that I have arrived at is that the action must be dismissed; but there will be no costs.

Action dismissed, without costs.

A. H. F. L.

[CHANCERY DIVISION]

GAGE V. THE CANADA PUBLISHING COMPANY ET AL.

Injunction—Fraudulent use by one of his own name—Trade Mark—Partnership—Release by retiring partner.

G. and B, being in partnership as publishers, B. prepared a series of head-line copy books, which were extensively advertised, and from which large profits were realised. These books were styled on their covers, "B system of practical penmanship," and were generally known and sold to the trade as "B's copy books," "B's copies," and "B's books." In 1879 the partnership was dissolved, B. releasing all his interest in the property, lease, stock, credits, and business, of the partnership to G. for \$20,000. Afterwards, in 1881, G. registered as a trade mark the name "B," in connection with "B's head-line copy books." In 1882, the C. Co., in connection with B., who was to share in the profits arising therefrom, commenced publishing and selling a book under the name of "B's new and improved head-line copy book." G. now sought an injunction against the C. Co. and B., restraining them from infringing his trade mark, and from advertising their books in such a way as to lead the public to believe them to be his head line copy books.

Held, on the evidence that G. had not acquired the right to use the name "B," as a trade mark.

Held, however, that inasmuch as the defendants' book was calculated to deceive the public into believing they were getting G's book, and the defendants fraudulently and collusively intended that it should do so, G. was entitled to a perpetual injunction restraining them from advertising, publishing, or selling, or advertising for sale, the book, "B's new and improved head line copy book," in and with its present form and cover, or in and with any other form or cover calculated to deceive persons into the belief that it was G's book.

THIS was an action brought by William Gage against the Canada Publishing Company (limited) and Samuel George Beatty, whereby the plaintiff claimed an injunction to restrain the defendants from infringing a certain trade mark claimed by him, and from advertising certain head-line copy books in such a manner as would lead the public to believe that they were the headline copy books of the plaintiff; and also claiming damages, and general relief.

The case was heard at Toronto on September 30th, October 2nd, 3rd, and 4th, and December 22nd and 23rd, 1882, before Ferguson, J.

The facts of the case are sufficiently stated in the judgment.

S. H. Blake, Q. C., for the plaintiff. As between the contracting parties no protection by registration is necessary; *Whiting v. Tuttle*, 17 Gr. 454. On the dissolution all passed to the plaintiff. The language of the deed is wide

enough for this; and the defendant received a valuable sum for the book in question. The word "property" passes everything: *Lind.* on Partn., 4th ed., vol. 1, p. 652; *Dickson v. McMaster & Co.*, Sebastian's Dig. case 260; *Schier v. Johnson*, 111 Mass., 238. The goodwill and trade-marks pass, and the goodwill includes the right to use the firm name. The force of the argument against preventing a man from using his own name is gone, when the name is attached to a particular article: *Hall v. Barrows*, 4 DeG. J. & S. 150; *Millington v. Fox*, 3 Myl. & Cr. 338; *Churton v. Douglas*, John. 174; *Mas-sam v. The Thorley's Cattle Food Co.*, L. R. 14 Ch. D. 748; *Perry v. Truefit*, 6 Beav. 66; *Franks v. Weaver*, 10 Beav. 303; *Metzler v. Wood*, L. R. 8 Ch. D. 606.

W. Cassels, on the same side. The trademark in question here is a perfectly good one. It was agreed to by the members of the firm, and the defendant Beatty cannot say that it was not good, and the defendant company are in no better position for they had notice. See *Bury v. Bedford*, 4 DeG. J. & S. 373; *Bump* on Law of Patents, Trade marks, and Copyrights, p. 360; *Webb v. Powers*, 2 W. & M. [U.S.C.C.] 497; *Collyer's Law of Partn.* Vol. 1, 572; *Lind.* on Partn. 3rd Ed., Vol. 2, p. 888; *Curt.* on Pat., 3rd Ed., p. 103, sec. 122; *Johnson v. Orr Ewing & Co.*, L. R. 7 App. Cas. 219; 42 Vic., ch. 22. D.

C. Robinson, Q. C., for the defendants, the Company.—The defendants did intend, and do intend, to produce a book better than the plaintiff's book, and this by the aid of Mr. Beatty, and they are legally entitled so to do. The document of August 28th, 1879, is simply a quit-claim deed, a release. One man may sell another a goodwill and set up the same business and ruin the one that he sold: *Walker v. Mottram*, L. R. 19 Ch. D. 335; *Labouchere v. Dawson*, L. R. 13 Eq. 322; *Leggott v. Barrett*, L. R. 15 Ch. D. 306; *Ginesi v. Cooper*, L. R. 14 Ch. D. 596; *Warne v. Routledge*, L. R. 18 Eq. 497; *Ward v. Beeton*, L. R. 19 Eq. 208. A man can be prevented from using his own name by express contract, or where he has combined his name with

other circumstances constituting fraud. But here there is nothing to deceive anyone about the books except the name "Beatty," and it is of this that the plaintiff complains. The American cases show that a man may use his own name, even with the express intention of injuring another man: *Meneely v. Meneely*, 20 Am. Rep. 489, S. C. 62 N. Y. 427; *Faber v. Faber*, 49 Barb. 359; *Clarke v. Clarke*, 25 Barb. 80; *Gilman v. Hunnewell*, 152 Mass. 150; *Marshall v. Pinkham*, 38 Am. Rep. 756; *Olin v. Bate*, 38 Am. Rep. 80. There may be a trade mark of a proper name but many others may have and use the same name: *Ainsworth v. Walmsley*, L. R. 1 Eq. 525. The contract does not show any specific agreement not to use the name. See *Fulwood v. Fulwood*, L. R. 9 Ch. D. 176; *James v. James*, L. R. 13 Eq. 421. The plaintiff could not register "Beatty" as a trade mark after the dissolution of the partnership, and obtain a new right, so as to prevent the defendant Beatty from using it. By the assignment the plaintiff got the right to the plates, and to print and sell any number of books from them, but he got nothing more. Besides the trade mark is "Beatty" in connection with "Beatty's Headline copy book," but the plaintiff never used this trade mark at all; the three things, the two books and the trade mark are all different the one from the other. No doubt a man may be restrained from using his own name in an improper manner. *Metzler v. Wood*, L. R. 8 Ch. D. 606, is a different case to this, for there the defendant put his name on a work that was not his own to make the public believe it was his work. There the name was used to represent a falsehood, here the name "Beatty" is used to represent the actual fact. *Levy v. Walker*, L. R. 10 Ch. D. 436, is also very different and indeed a case utterly the opposite of this. No doubt if the defendants have done anything apart from the use of the name "Beatty" that is calculated to induce the public to think the one book is the other, they may be restrained from continuing to do that, but if people have been deceived by the use of the name, it is our name and we have

the right to use it. I refer also to *Burgess v. Burgess*, 3 DeG. M. & G. 896; *Cocks v. Chandler*, L. R. 11 Eq. 446; *Farina v. Silverlock*, 6 DeG. M. & G. 214; *Hogg v. Kirby*, 8 Ves. 215; *Cary v. Longman*, 1 East 361; *Sykes v. Sykes*, 3 B. & C. 541; *Maxwell v. Hogg*, L. R. 2 Ch. 307; *Bininger v. Ulast*, 10 Abb. Prac. Rep. 264; *Pollock on Cont.*, 3rd Ed. 327; *Brown on Trade marks*, Secs. 260, 390; *Brooklyn White Lead Co. v. Masury*, 25 Barb. 416, S. C., *Sebastian's Dig.*, case 154; *Mitchell v. Reynolds*, Sm. L. C., 8th ed., vol. 1, p. 417.

J. Bethune, Q. C., for the defendant Beatty. There was no idea here of acquiring a trade mark while the firm were dealing under the copyright, which they registered in September, 1877, under the Act of 1875. It was copyright only until the dissolution of the firm. See *Brown on the Law of Trademarks*, Secs. 116, 117.. A copyright will not pass without a document describing it, and it must also be recorded: *Leyland v. Stewart*, L. R. 4 Ch. D. 419; *Jeffreys v. Boosey*, 4 H. L. C. 815; *Stephens v. Caddy*, 14 How. 528; *Stephens v. Gladding*, 17 How. 447. The sale of the plates did not pass the exclusive right to publish: *Taylor v. Bothin*, 5 Sawyear, 584. The goodwill did not pass by the deed of August 28th, 1879. The circulars which were sent round show that there could not have been a fraudulent intent to sell the books as the plaintiff's book. As to the copyright, there was no proper entry according to the Act, of the plaintiff's book, and this would be a sufficient answer if this was an action for the infringement of copyright, or if an amendment were allowed. No amendment, however, should be allowed. Besides the defendants' book is a new book, and on this ground they could stand by it. See *Wotherspoon v. Curry*, 5 H. L. 508. As to the trade mark, the design or trade mark sent to the Minister was not tried at all, and what the plaintiff calls his trade mark was not his trade mark at all. Besides Beatty's name could not be registered without his knowledge or consent so as to deprive him of the right to use it. On this part of the case

I refer to *Moak's Notes*, Vol. 27, p. 18; *Farina v. Silverlock*, 6 DeG. M. & G. 214; *Leather Cloth Co. v. American Leather Cloth Co.*, 1 H. & M. 271, S. C., in App. 11 H. L. C. 523; 42 Vic. Ch. 22 D., secs. 6. 9. 10; *Manhattan Medicine Co. v. Wood*, 4 Clifford 461. I also refer to *Sebastian's Dig.*, p. 56; *Huwer v. Dannenhoffer*, 82 N. Y. 499; *Brown on Trade marks*, p. 258, sec. 361; *Canal Co. v. Clarke*, *Whitman's Pat. Cases* 352, S. C. 13 Wall. p. 311; *Kidd v. Johnston*, 100 U. S. 620; *Kennedy v. Lee*, 4 Mer. 441; *Hudson v. Osborne*, 39 L. J. Ch. 79; *Aimsworth v. Bentley*, 14 W. R. 630; *Rogers v. Rogers*, 11 Fed. Rep. 495; *Johnston v. Orr Erwing & Co.* L. R. 7 App. Cas. 219.

C. Moss, Q. C., also for the defendant Beatty. If the plaintiff succeed in his contention as to the trade mark, the defendant Beatty will be for ever prevented from using his own name. In order that he may succeed he must show that he had the trade mark, and that Beatty has infringed it. But to have a trade mark in the name "Beatty" the plaintiff must have acquired it before the dissolution. No trade mark, however, was gained during the partnership. Indeed a trade mark is not applicable to a book at all. If the plaintiff acquired a trade mark, any publisher would acquire a trade mark in the name of the author of a book published by him. The terms of the document of dissolution must last forever. The statement of the consideration in that document is conclusive. Moreover, if a firm has a trade mark, and dissolves, each partner has a right to it: *Huwer v. Dannenhoffer*, 82 N. Y. 499. Here there was neither grant nor covenant; the release could be no more than a license for the balance of the five years. See *Amoskeig Manufacturing Co. v. Spear*, 2 Sandf. 606; *Kelly v. Byles*, L. R. 13 Ch. D. 682. The plaintiff was not the first to use the mark. It was an untrue statement to say he was. *Miller & Co.* had used it. The first time the plaintiff used it was after the dissolution, and he could not by this become the proprietor within the Act of 1879. Hence the regis-

tration of the trade mark was bad. As to how far the mark could become a trade mark before registration, see *Brown on Trade marks*, 1st Ed. sec. 129, p. 86.

S. H. Blake, Q. C., in reply. The main point is, the similarity of the books. The question is not what the defendant Beatty can or cannot do with his own name. The point is, that the name is impressed on the article, it is one of the *indicia* by which the property or parts of it are known. As to the document of dissolution, when one party sells out to another no covenant is necessary. Looking at the surrounding circumstances the proper construction of the document is clearly that the property in question passed. *Labouchere v. Dawson*, L. R. 13 Eq. 322 is not interfered by *Walker v. Mottram*, L. R. 19 Ch. D. 355, and shows that a man cannot depreciate what he has sold, and here Beatty sold, and got consideration for the name on the book, and he cannot derogate from that. See too, *Croft v. Day*, 7 Beav. 88. If the defendants use the name Beatty, they must do it so as not to interfere with the plaintiff's rights. To this extent the defendant Beatty has abridged his rights in respect to the use of his own name. It is no difference whether the defendants are guilty of moral fraud or not, if as a matter of fact what they are doing is injuring the plaintiff: *Walker v. Mottram*, *supra*; *Orr, Ewing & Co. v. Johnston*, L. R. 13 Ch. D. 447. See, also, *Singer Manufacturing Co. v. Loog*, L. R. 18 Ch. D. 395; *Davis v. Kennedy*, 13 Gr. 529; *Davis v. Reid*, 17 Gr. 69; *Seixo v. Provezende*, L. R. 1 Ch. 192; *Ainsworth v. Walmesley*, L. R. 1 Eq. 524; *Holmes, Booth & Hayden v. Holmes, Booth & Atwood Manufacturing Co.*, 34 Conn. 294; *Wotherspoon v. Currie*, L. R. 5 H. L. 516; *Leyland v. Stewart*, L. R. 4 Ch. D. 420. When a partner goes out of a firm the goodwill remains with the other partner. In the case of a trade mark, or a mark impressed on goods, the mark goes with the goods on which it is: *The Leather Cloth Co. v. American Leather Cloth Co.*, 11 H. L. 533. I refer, also, to 11 Fed. Rep. 499; *Webster's Pat. Cas.* 291; *Gillies v. Colton*, 22 Gr. 123;

Kiely v. Smith, 27 Gr. 227; *Story* on Partn. sec. 98; *Lindley* on Partn. 642, 643, 863-867; *Drone* on Copyright, 321; *Brown* on Trade marks, 256, 257; *Joyce* on Injunctions, 314; *Hall v. Barrows*, 4 DeG. J. & S. 150.

January 8th, 1883. FERGUSON, J.—From May 1st, 1877, to August 28th, 1879, the plaintiff and the defendant Beatty were in partnership, and carried on business as publishers and wholesale book sellers and stationers in the City of Toronto under the name and firm "Adam Miller & Co." and as the evidence shows a very considerable branch of the business consisted in the manufacture and sale of head-line copy books for use in schools, &c. During the partnership the defendant Beatty designed a head-line copy book, which (after some discussion as to what name should be given it) was called "Beatty's System of Practical Penmanship." This name is the one that appears on the books but the evidence shows that they were known as "Beatty's Copy Books," as "Beatty's Copies," and as "Beatty's Book." Much time and money were spent in putting this book upon the market by advertising, travelling, &c. It became a very popular book, was much used in the schools in the Dominion, and lately in the Province of Ontario has been so popular as to be used almost to the exclusion of all others. Much of its popularity, and consequent value, were due to the exertions and expense incurred by the firm to put it upon the market. These exertions, &c., were by some of the witnesses called the "push." The profits arising from the sale of the books are very large. The period of the partnership was to be five years. The articles of partnership contained a provision to the effect that, if either partner should at any time during the continuance of the partnership, desire to terminate the same, he should give notice containing a statement of the terms on which he should be ready to sell to the other partner his interest in the business or to purchase from the other partner his interest, these terms to be identical. It does not appear, however, that any such

formal notice was given by either partners. The defendant Beatty in his evidence says that shortly after he went into the business he found it in a crippled condition financially: that the plaintiff went to England and he (Beatty) had much trouble during his absence: that he wrote the plaintiff, and after his return told him that he wanted to retire. After this, however, the partnership went on for two years or thereabouts. He says that in 1879, and shortly before the dissolution, the plaintiff asked him if he still had the same idea as to a dissolution and he replied that he had, and that, some four weeks after this, the plaintiff came to him and said that he had made arrangements to purchase his (Beatty's) interest.

A statement K. produced at the trial purporting to be a balance sheet on June 1st, 1879, was then shown him. This indicates a balance \$31,505.82 the half of which would be \$15,752.91. Mr. Beatty says, however, that prior to this the book-keeper had brought in a rough statement of the position of the firm showing that his half of the balance would be about \$20,000. This is disputed, and I do not think it satisfactorily proved. Mr. Beatty says he told the plaintiff he would take \$20,000, and the plaintiff agreed to give him this sum, and by a document of the dissolution of the partnership dated August 28th, 1879, the defendant Beatty, for the consideration of \$20,000 and an indemnity against the liabilities of the firm *released* all his interest in the property, lease, stock, credits, and business of the partnership to the plaintiff, and it is not disputed that this \$20,000 has been paid. Ordinarily the document of dissolution alone would be the evidence on the subject, but evidence of what led to the execution of this paper was in this case given upon the contention that a large part of this consideration was given in reality in respect of the interest in the copy books in question, the document being in its terms very general, and it being alleged and shown, I think, that this was a very valuable, if not the most valuable item of the business. After the dissolution the business was carried on by the

plaintiff under the name "W. J. Gage & Co." The defendant Beatty engaged in the druggist sundries business and continued therein till about February last.

Before the incorporation of the defendants The Canada Publishing Co., the business that they now carry on was carried on by a partnership under the name "James Campbell & Son," and young Mr. Campbell, as I understand, is now the manager of the defendant company, and that partnership purchased this copy book largely from the plaintiff. During the continuance of that partnership there was dissatisfaction in respect of the dealings with the plaintiff regarding this copy book owing to his refusal to make certain allowances or discounts on the purchases, and, one Mr. Taylor, then interested in the firm, proposed to Mr. Campbell to procure some man whose name was "Beatty" and prepare for the market and sell a book independently of the plaintiff, but this Mr. Campbell declined to do unless he had the real Mr. Beatty. After this, according to the evidence of the defendant Beatty, one Blackall, who had a contrivance for holding separate headlines, came to him and asked him to prepare head-lines for him, but he (Beatty) declined, not having time to attend to it. He says he then saw the plaintiff about this, and, after some conversation on the subject the plaintiff offered him \$500 if he would not do so, or, I think, bring out any other book. This offer was declined, it being said that it looked too much like "blood money." Some communication had taken place between Mr. Campbell and Blackall, and after this there were several interviews between Mr. Campbell and the defendant Beatty, and they finally entered into an agreement for the preparation and publication of books to be called "Beatty's New and Improved Head-line Copy Book." The terms of this agreement are stated in the letter of February 14th, 1882, from Campbell to Beatty. According to this agreement Beatty was to get 60 cents per gross for the first year and 75 cents per gross after that. Mr. Campbell says that before this agreement he asked Beatty if he had given the

plaintiff any writing granting him the exclusive use of his (Beatty's) name, and that Beatty answered saying there was nothing in writing that would have any "influence" on his name. Further on Mr. Campbell says Beatty said there was no reason in writing why his name should not be used, but there might be some reason, "quibble," or legal "dodge," or something of that sort. Still further on he says that what Beatty said was to the effect that 'lawyers might find some reason to frame a suit upon.' An agreement between the defendants containing a clause for the protection of the defendant company against any action that might be brought by the present plaintiff was prepared but for some cause this was not executed, though it was not denied that it was intended to be executed in its present form, and it was said that it not having been signed was owing to carelessness only. Mr. Campbell says that Mr. Beatty objected to a clause in the agreement binding him to bear the *whole* costs, &c. of any suit that might be brought by the present plaintiff, and it was finally agreed that each of the defendants should bear half the expense and damages in the event of any suit being brought and sustained by the present plaintiff, and that this was inserted in the agreement (the one that was not signed or executed). Pursuant to the agreement between the defendants, the defendant Beatty prepared a book. This was being advertised, put upon the market and sold by the defendant company at the time of the commencement of this suit. The name of this book is "Beatty's New and Improved Head-line Copy Book," and by this name it was so advertised and sold. Before the commencement of this suit, and in the month of August, 1881, the plaintiff using the name "W. J. Gage & Co." registered a trade mark, stating that the specific trade mark consisted of the name "Beatty" in connection with "Beatty's Head-line Copy Books," and that he verily believed it to be his on account of his having been the first to make use of it.

The plaintiff, amongst other things, charges the defendants with collusion and fraud in the use of the name "Beatty"

in connection with the defendants' books, and alleges that the defendant company will sell large numbers of the books to persons who buy the same under the belief that they are the plaintiff's books, and asks, amongst other things, that the defendants should be enjoined against infringing the trade-mark, and against advertising their books in such a manner as will lead the public to believe that they are the head-line copy books of the plaintiff, and he asks general relief. The plaintiff states, amongst other things, that the name "Beatty" as applied to the head-line copy books was at the time of the dissolution of the firm (composed of himself and the defendant Beatty) a valuable asset of the firm, and had been a trade mark of the firm, and that the right to use that name was one of the assets of the firm purchased by him, and that the price paid by him to the defendant Beatty for his interest was chiefly paid on account of the interest in the head-line copy book, and he contends that the defendant Beatty should not be permitted to derogate from the right that he sold the plaintiff, and that the defendant company is in the same position, as they had full notice of the facts and the relative position of the plaintiff and Beatty, and also that the use of the name "Beatty" as it is used by the defendants is *fraudulent* as against him.

The defendants contend that the publication and sale of their books is purely a business transaction, and undertaken and done in the ordinary course of business without relation or reference to the plaintiff or his head-line copy books, and they deny all fraud or fraudulent intention charged against or imputed to them in the premises. They also deny that the plaintiff has the trade mark as he alleges, and they contend that the alleged registration of such trade-mark is void by reason of false statements made by the plaintiff in procuring the same.

At the trial (which lasted only six days) a very large volume of evidence was given. The arguments of counsel on each side were very able and exhaustive and a very large number of authorities were referred to, read, and commented upon.

It was, I think, clearly shown that the name "Beatty" is that which gives the great value to the plaintiff's book and that this value is greatly the result of the exertions, and expenses borne, by the firm Adam Miller & Co. (while composed of the plaintiff and the defendant Beatty) by their putting the book (under that name) upon the market with energy and perseverance. It is also, I think, shown, beyond any doubt, that the defendant company, being aware (through its manager) of all this, and of the sale and release by the defendant Beatty to the plaintiff desired to publish a work under the name "Beatty" in order thereby to take from the plaintiff the profits he was deriving by the sale of his book, or a large part of such profits. That the defendant company did put upon the market their book under the name "Beatty's" is undisputed, and after hearing all the evidence on the subject and looking at the two books and hearing all that was, and, as I think, could be urged on behalf of the parties respectively, I have no difficulty whatever in arriving at the conclusion that the defendants' book in the form in which it is, and sold in the manner in which it has been shown to have been sold, is calculated to deceive the public and mislead them into the belief that when they purchased the defendants' book they are getting the plaintiff's book, the one they have known as "Beatty's book;" that is to say, the ordinary purchaser desiring to purchase the plaintiff's book would purchase and take the defendants' book without recognizing the difference, and that in this way the plaintiff's trade would be materially and greatly interfered with and prejudiced.

A question to be determined is as to whether or not the plaintiff is entitled as he alleges to the name "Beatty" in connection with "Beatty's Head-line Copy Books" as a *trade mark*.

In *Brown on Trade marks* at p. 79, section 116 it is said that books, as literary productions, cannot be protected by trade marks, but as mere merchandise they can be so protected, and at section 117 it is said that it must be borne in mind that it is as merchandise merely that books are

protected by marks of commerce and that this is because a book, as such, has its protection under the copyright laws, and I have not found any authority directly conflicting with these statements.

The firm "Adam Miller & Co." obtained a copy right of the plaintiff's book on March 16th, 1878, and it appears to have been by this copyright that they considered the book protected. Since the dissolution of that firm the plaintiff has continued to publish the book, and the copies of this book produced at the trial are marked "Entered according to Act of Parliament," &c., the words required by the Copyright Act, though it was said that these words are not in the proper place on the books.

The plaintiff does not in this action make any claim in respect of any infringement of his copyright. Evidence of it was given, against the objection of the defendants, on the ground that it was a further description and identification of the item of property about which there was so much contention.

It appears to me that there was not really any use of the name "Beatty" by the firm Adam Miller & Co. as a *trade mark* and that they considered their book protected by the copyright, and I cannot consider this like the cases where a mark had been put upon manufactured goods and continued so long and become so well known that it denoted the quality of the goods rather than indicated who manufactured them. I do not think that either of the members of that firm considered that they were using the name "Beatty's" as a trade mark or mark of commerce upon merchandise at all or in any other sense than as the name of the author of the book, and I am of the opinion that at the time of the dissolution it was not a trade mark, and did not, as such, pass with the business to the plaintiff. Then, assuming this to be correct, can it be said that the plaintiff could afterwards without the consent of the defendant Beatty, acquire a right to his name as a trade mark, and register, and have, and be protected by it, and this as against Beatty him-

self? I think it plain that he could not, and my conclusion is, that the plaintiff is not entitled to the name "Beatty" as a trade mark. I think I need not further refer to the registration of this as a trade mark, or to the statement that was made by the plaintiff on which the registration took place, or the necessity of registration before any proceedings to prevent infringement.

It is not denied that the plaintiff has the right to publish and sell his book as he is doing. It was admitted and stated at the bar by counsel for the defendants that the plaintiff has this right. There is no dispute whatever as to this.

The defendants' book is advertised as "Beatty's New and Improved Head-line Copy Book." The same words are on the covers of the books, and the name "Beatty" is repeated on the covers in a conspicuous position, and upon the evidence I am of the opinion, indeed I have no doubt that it is the fact, that the defendants knowing as they did know, that what the public wanted and demanded was "Beatty's book" made use of the name "Beatty" for the purpose of having their book sold as and for the plaintiff's book in the way that I have before mentioned, and I think the evidence shows that this effort on their part was successful so far as their scheme was carried into effect, and that the strong probability (almost certainty) is, that it would be successful in future if it were permitted to be carried out. I do not think this at all a case of a different book, alleged to be a better one, being published with the view of its eclipsing a rival book by fair competition in the business. I do not think it an answer to say that the defendant company told those to whom they made sales of invoices of their book that it was a book different from the plaintiff's book and required their travellers to do the same thing (if they really did so): *Wotherspoon v. Currie*, L. R. 5 H. L. 516, 517; *Joyce on Injunctions*, 314 315. The book was put upon the market and furnished to others to be sold by them and exhibited to the public for sale in such a form and manner as to deceive people

into the belief that the one book was the other book. The defendants must have known this would be so, and I have no doubt that they intended that it should be so, and the evidence shows that some of the public were in fact so deceived. Some of the evidence for the plaintiff goes to show that as many as nineteen out of twenty persons would be so deceived, and the evidence for the defence (some of it) goes to show a majority of persons would be deceived in this way.

The preparation of the book was, I think, a part of the scheme, and I incline to the opinion that, on the merits, the so called novelties and improvements are mere colorable changes. The argument that owing to the organization of and the manner of conducting schools at the present time, the difference between the books would in many cases be liable to be, and probably would be, detected in the classes in the schools does not I think meet the case, and, after an attentive consideration of the subject, I am of the opinion that the plaintiff has succeeded in establishing the collusion and fraud that he has charged against the defendants in this respect, and I think it my plain duty to express this finding in unmistakable language, however strong the desire to avoid the necessity of so doing. I think it proved that the plaintiff paid for this book a large part of the consideration that he gave the defendant Beatty, and my opinion is, that the evidence given by Mr. Bain and Mr. Campbell in regard to the value of the copyrights at the time of the dissolution could not be acted upon with safety if a necessity arose for so doing. In this case an injunction is asked to restrain the defendant Beatty (with his co-defendants) from using his own name, and it has been objected that cannot be done. In the case *Rogers v. Rogers*, 11 Fed. Rep., p. 495, it is said the books are full of cases in which defendants have been restrained from using their own names in a way to appropriate the goodwill of a business already established by another of that name, referring to *Croft v. Day*, 7 Beav. 84; *Metzler v. Wood*,

L. R. 8 Ch. D. 606, and a large number of English and American cases, many of which were referred to in the argument, and also referring to the language of Lord Justice James in *Levy v. Walker*, L. R. 10 Ch. D. 447 and 448 : "It should never be forgotten in these cases, that the sole right to restrain anybody from using any name that he likes in the course of any business he chooses to carry on, is a right in the nature of a trade mark, that is to say, a man has a right to say: 'You must not use a name whether fictitious or real—you must not use a description whether true or not, which is intended to represent or calculated to represent, to the world that your business is my business and so by a fraudulent misstatement deprive me of the profits of the business which would otherwise come to me.' That is the principle and the sole principle on which this Court interferes."

In *Singer Manufacturing Co. v. Loog*, L. R. 18 Ch. D. 412, 413, the same learned Judge says: "I am of the opinion that there is no such thing as a monopoly or property in the nature of a patent, in the use of any name. Whatever name is used to designate goods, anybody may use that name to designate goods; always subject to this, that he must not make directly, or through the medium of another person, a false representation that the goods are the goods of another." * * It comes entirely within those cases in which it is calculated, and if calculated, must be assumed to have been intended to make a false representation." There are, however, many authorities to show that the fraudulent intent the *animus furandi* must be shown. In this case it has, as I have said, in my opinion been shown.

In *Sebastian on Trade Marks*, p. 154, it is said: "In some cases the use of a man's own name may be such as to deceive, and where this is so the person aggrieved is entitled to an injunction against such use of the name, but he must prove clearly the fraudulent intent, and it is a question of evidence in each case whether there is a false representation or not."

Many of the cases, I think, show that a man cannot make such a fraudulent use of his own name or permit or authorize another so to do. One of the learned counsel for the defence did not, as I understood his argument, dispute this proposition, but I do not desire to impute an admission either of fact or in respect to the law to any counsel without being entirely certain that he intended to make it, and did make it.

After a perusal of all the authorities referred to on the argument I think the plaintiff entitled to an injunction against the defendants, restraining them from advertising, publishing, selling, or offering for sale, the book "Beatty's New and Improved Headline Copy Book," in and with its present form and cover, or any other form or cover calculated to deceive persons into the belief that it is the plaintiff's book. This form is mainly taken from *Metzler v. Wood*, L. R. 8 Ch. D. 606. It may perhaps be changed more or less in settling the judgment. They cannot be permitted, I think, to sell their book as and for the plaintiff's book or to permit or place others in a position so to do, as I have found upon the evidence they are doing, and I think they (the defendants) are both responsible as being parties to a collusive scheme, the defendant company, though incorporated, seeking the benefit of their manager's act are responsible for the act.

I think the plaintiff is entitled to his costs from the defendants. As the contention in respect of the alleged trade mark occupied but a small fractional part of the time spent at the trial and occasioned but a comparatively small part of the expense, and, as I have found against the defendants on the ground that I have, there will be no division of costs.

Judgment accordingly.

A. H. F. L.

NOTE.—This case has been carried to the Court of Appeal.

[CHANCERY DIVISION.]

CAMPBELL V. MCKERRICHER ET AL.

Promise to make a will—Representation—Part performance—Father and son—Statute of Frauds.

C. C., the plaintiff, alleged that A. C., his father being the owner of certain land, induced him to abstain from enforcing a certain claim, and also to work on the land, by representing that he would devise the land to him, which he afterwards represented that he had done; and, A. C. being dead, C. C. now claimed the land as against one to whom A. C. had devised it by a later will, revoking the former one. The execution of the former will was proved as alleged.

Held, reversing the decision of Proudfoot, J., that this was not such part performance as to take the case out of the Statute of Frauds, for the execution of the former will was the act of the person whose estate it was sought to charge, and not of the person seeking to enforce the contract, and, moreover, did not import a contract, but only indicated a benevolent intention displayed by the testator in the execution of an instrument essentially of a revocable nature.

Quære, whether if it had been proved, which it had not, that A. C. had by his representations that he had devised the land to C. C., induced him to forego his claim, and to work on the land as alleged, this would have entitled C. C. to succeed.

To take a case of alleged contract concerning land out of the Statute of Frauds, the acts of part performance must be done by the party seeking to enforce the contract, and must be such as to manifest from their nature that there is some contract between the parties touching the land in question, and the proper order of marshalling the evidence in such cases is first to prove the part performance, and so let in parol evidence of the agreement sought to be enforced.

Per Proudfoot, J. A son working at home upon his father's place, would not be entitled to recover for work and labour in the absence of an agreement to that effect.

Per Proudfoot, J. It being proved that the former will in this case was made pursuant to the agreement alleged, that will might be considered as evidence of the agreement, and was evidence in writing sufficient to satisfy the Statute of Frauds.

Maddison v. Alderson, L. R. 9 App. Ca. 467, followed.

THIS was an action brought by Colin Campbell against Ann McKerricher and James Campbell, claiming to be entitled to certain lands.

In his statement of claim the plaintiff set out that one Archibald Campbell, father of the plaintiff and the defendants, in his lifetime owned in fee simple the land in question, and farmed it, and he, the plaintiff, besides working on the said farm during his minority, as a child usually works for his father in his rank and station in life, worked continuously upon the said farm and furnished material for building thereon from 1860 until about 1874, and during the former years of that period of time the said Archibald Campbell became indebted to him in large sums

of money : that in 1870 he and Archibald Campbell had a settlement of accounts between them, and the said Archibald Campbell was found indebted to him in the sum of \$540 : that the said Archibald Campbell, upon the said settlement being made, agreed to devise to him, the plaintiff, the land in question in payment of the said \$540, and requested the plaintiff to continue to remain and work upon the said farm for hire, and the plaintiff consented to the terms of the said agreement and did remain and work upon said farm as requested for several years thereafter.

Then in the 6th paragraph of his statement of claim he alleged as follows :—

“ After the said agreement the said Archibald Campbell by representing to the plaintiff that he had devised the said land to the said plaintiff, (which representations the plaintiff believed were true) induced the plaintiff not to enforce the claim he might have made for said \$540, and further induced him to remain and work for several years upon the said farm without receiving adequate (if any) compensation for his services, and by reason thereof the claim which the plaintiff might have made for such \$540 and work could not now or when the plaintiff first became aware that said Archibald Campbell had otherwise as hereinafter set forth devised and pretended to devise the said south-east quarter of said lot” (the land in question) “ be enforced on account of the provisions of the Statute of Limitations, and the plaintiff believing the representations of the said Archibald Campbell, and that said land had been and was devised to and would after the death of said Archibald Campbell become the property of the plaintiff, remained and worked upon said farm as aforesaid and did not attempt to enforce or collect his claim for said \$540.”

And the plaintiff charged and alleged the fact to be, that in pursuance of the said agreement the said Archibald Campbell did devise the said land to him, and that the same was so devised during and after the time when the said Archibald Campbell made such representations ; and that his will, by which the same was devised, was duly

executed to pass real estate while he the plaintiff worked on the said farm, before the year 1874: that in consequence of such agreement and representations, and the making of the said will, and in expectation of receiving the said land by devise, he worked upon and improved the land, and greatly altered his circumstances and position in life, and did not attempt to enforce any claim against Archibald Campbell for the \$540, or for his services upon the farm: that about April, 1881, the said Archibald Campbell, without the knowledge and consent, and against the wish of the plaintiff, pretended to make a will by which he left all his real and personal property to his daughter, the defendant Ann McKerricher, subject to a certain disposition in favour of his son, the defendant James Campbell: that Archibald Campbell died in September, 1881: that under and by virtue of the said pretended will the defendant Ann McKerricher had taken possession of the land in question, and pretended and claimed that the same was devised to her, and that she was entitled to the same absolutely free from any claim or interest of the plaintiff, therein. And the defendant James Campbell, for himself, and as one of the family of the said Archibald Campbell, under and by virtue of the pretended will, claimed that he was entitled to a lien and charge upon the said land, free from any claim or interest of him, the plaintiff, and the defendants refused to give up possession to him of the land, or release their pretended claim therein, or compensate him for the said \$540, or for his work and labour on the farm. And the plaintiff claimed that the said first-mentioned will of the land to him might be established, and declared to be valid and binding, and sufficient to pass the land to him, and that he might be declared to be the owner thereof, and entitled thereto: that the said last-mentioned pretended will might be declared to be inoperative so far as it affected, or appeared to affect, the said land, or the title thereto, and he asked for costs of suit and general relief.

The defendants delivered a joint statement of defence, in which they denied that Archibald Campbell was ever indebted as alleged, or that there was ever any such statement or agreement as alleged, and they denied that the plaintiff worked at home continuously during his minority, or furnished materials for building on the farm, but asserted that, on the contrary he was, during the said period, absent from home the greater portion of the time, making his father's house his home when out of employment. They also denied that any representations were ever made by the said Archibald Campbell to the plaintiff, as alleged in paragraph 6 of the statement of claim, the said Archibald Campbell being at all times free to dispose of the lands by will or otherwise, and to alter, change, or destroy any former will, if any such were ever made in favour of the plaintiff, which they denied, and they claimed the benefit of the Wills Act of Ontario (R. S. O. ch. 106), and also of the Statute of Limitations (R. S. O. ch. 61), and the Statute of Frauds.

The case was heard at Chatham before Proudfoot, J., on April 24th, 1883.

The evidence adduced sufficiently appears from the judgments.

M. Wilson, for the plaintiff.

C. Moss, *Q. C.*, and *N. Mills*, for the defendants.

April 24th, 1883. PROUDFOOT, J.—The allegation in this case as set out in the bill is, that upon a settlement being made between the father and the son in which \$540 was found due to the plaintiff, the father agreed to devise to the son the south-east quarter of the lot in payment of the \$540 and requested the plaintiff to continue to remain and work upon the farm for hire, and upon the terms of this agreement, he did remain and work on the farm as requested, for several years thereafter.

Now the first question is, what is the meaning of that

alleged agreement? Agreeing to devise to the plaintiff is simply agreeing to make a will containing the devise. It is an agreement to make an effectual devise, that is by a will that should be in force at the time of the testator's death. I think that the plain common sense of the matter, the understanding between the parties would be, that the making of a will which was to carry out this agreement, was one that would convey the property to the plaintiff: that it could not be satisfied by the mere making a paper containing a devise of this kind and then revoking it: that would not be the intention of the parties.

However, the Statute of Frauds is pleaded, and the question is, whether there is evidence corroborative of that given by the plaintiff sufficient to take it out of the statute.

Now the plaintiff swears distinctly to this agreement, that the father and he came to a settlement in 1869 I think, and that the \$540 was due to the son, the plaintiff. Then in 1870 the father agreed that if the son would remain on the place and would work with him for wages that were agreed upon, ten shillings a day, that he would make a devise of the property to him. The son swears to that distinctly. He says, "father and I had a settlement in 1869, when he was found to owe me \$540. He gave me a bill of it. In the spring of 1870 our family left, and father wanted me to stop and work with him; he said if I would stay he would will me everything he had, and he told me to harness the horse, and he and mother went away, and on his return he told me he had made his will and had given me fifty acres, clear of all incumbrance, for the \$540 and he asked me if I would take that, and I said I supposed I would have to."

I don't apprehend that that is to be taken as a compulsory forcing by the father upon the son of this revocable instrument, but that the real understanding between the parties, from the commencement when

they were talking about settlement in 1870, was that the will should be made; and that the father went for the purpose of making a will, and that the son knew it, and, although he would have been better pleased to have had a deed of the place which would have been irrevocable, yet that he was satisfied to take that as the next best thing that he could get.

Then is there any corroborative evidence of that agreement? That there was an agreement by which the father was to pay wages to the son I think is satisfactorily established. The father by his repeated acknowledgements admitted that he was a debtor to the son, and that he owed him; he couldn't owe him unless there had been an agreement for that purpose, because the son working with the family on his father's place would not have been entitled to recover for work and labor, or for money, or anything of the kind in the absence of an agreement.

So that the admissions of the father, I think, are sufficient to show that there was an agreement by which he was to pay his son for his labour.

The next point is, is there any corroborative evidence of the agreement by which a will was to be made. I think there is. The evidence of the father's statement to Dick and his own wife are evidence that he had made this will in pursuance of the agreement with the son, that he hadn't anything else to give him, that he was owing him a large sum of money, more than he could afford to pay, and that he had given this in satisfaction of it. Mr. Dick's evidence, and Mrs. Dick's (a) evidence were both very strong in favour of that conclusion. Then there is the evidence of a will having in reality been made. Mr. Tiffany (b) proves that he made a will by which this piece of property was devised to the plaintiff. Mr. Grant (c) proves that he also made a will to the same effect, and I

(a). Mrs. Dick was sister of the plaintiff; Mr. Dick was her husband.

(b). Mr. Tiffany was a solicitor, practising at Ridgetown.

(c). Mr. Grant was Township Clerk of Ridgetown.

think that upon the evidence I must take it to be proved that both of these instruments were executed in such a way as to pass real estate. The father said he had made a will, and I must assume that it was effectually made. Mr. Grant's evidence is that the will made by Tiffany was executed, according to his recollection, as by law required, and that there were the necessary number of witnesses, and that it contained all the statements in the attestation clause that were necessary to give it validity.

I take it then that the evidence is sufficient to shew that a will was made in pursuance of this agreement, and I think that where it is established that it was made in pursuance of the agreement that it may be considered as evidence of the agreement itself, and was therefore evidence in writing sufficient to satisfy the statute of an agreement that had been made that this will should be made, as the evidence seems to me to establish that it was made in pursuance of the agreement.

There is no doubt some discrepancy about the dates spoken of by the witnesses: the plaintiff saying the will was made in 1870, while Tiffany said he drew the will in 1873 but I don't think I ought to bind the plaintiff by a statement of that kind. It is evident that he is very uncertain as to date, that he has no means of determining at what length of time from the present that will had been executed. He can't read, and he can't write, and he can keep no notes, but there is the evidence of Dick and his wife, and Tiffany, that the will really was made in 1873. I don't think I ought to preclude the plaintiff from enforcing his agreement with regard to this fifty acres of land, because he had made a claim for the money. This claim it is true was a demand for money, but it included a great deal more than is now sought to be enforced. What is now sought to be enforced is not a claim for the \$1,205 such as was stated there, but for the \$540 which only comprises one item of the account, and nothing seems to have been done. He hadn't got paid; he hadn't got the land, and it was not unnatural that he should make some effort to get

one or the other, but nothing having been done upon this, I don't think I ought to consider it as a binding election by which he was to be precluded from enforcing what I think is shown to have been the agreement between the parties.

I may be mistaken in the conclusion I have come to; of course defendants in that case will have an opportunity of setting it right.

I think the plaintiff is entitled to the decree for the fifty acres.

[Mr. Wilson asks that the decree may direct the defendants to convey the fifty acres to the plaintiff.]

PROUDFOOT, J.—If you want a decree for that purpose you can have it.

I may say there are two grounds upon which part performance might be alleged, not only the working which is insisted on by Mr. Wilson, but there was the not suing. Now the not suing here for the amount of the debt was a prejudice to the plaintiff which he was induced to submit to on the supposition that he was going to get the land, and the effect of that has been that he has lost, I apprehend, his remedy for that \$540 by the lapse of time.

His position, therefore, is materially changed by the not having that agreement carried out.

On September 11th, 1883, the defendants moved by way of appeal to the Divisional Court before Boyd, C., and Ferguson, J.

B. B. Osler, Q.C., for the defendants. If the will was made in 1873, a very slight amount of work was done after the will was made. The evidence here does not shew the will was made in pursuance of any agreement, nor does the will itself shew this: *Maddison v. Alderson*, L. R. 5 Ex. D. 293, S. C. in Appeal, 8 App. 467 is very like this in its circumstances. There is nothing here in the conduct of father and son to take it out of the ordinary duties arising from the relation of father and son. The confirmatory evidence in *Orr v. Orr*, 21 Gr. 397, was stronger than this. *Jibb v.*

Jibb, 24 Gr. 487, which followed *Orr v. Orr*, is very like this, and these show the judgment cannot stand. I refer also to *McManus v. McManus*, 24 Gr. 118.

[BOYD, C.—The execution of the will here is the point of distinction].

But unless the agreement is proved, this execution of the will cannot be relied on. It is hard here even from evidence of the son himself to make out the existence of a parol agreement. Could the son have sued for his wages the day after the will was made? There was nothing to prevent it.

The judgment on fact of a judge is viewed differently in an Appellate Court from that of a jury. The latter is only interfered with in very strong cases. On a rehearing the Court should give the judgment, the Judge below ought to have given both on facts and law. This is accepted in the Common Law Courts.

C. Moss, Q.C., on the same side. The Court of Appeal is always at liberty to review the inferences drawn by a Judge from the evidence. It is only when a Judge has believed one side in a case of conflict of evidence that an Appellate Court will refuse to review his finding: *Armstrong v. Gage*, 25 Gr. 1, 38; *Jones v. Hough*, L. R. 5 Ex. D. 115. Here the Judge himself says in his judgment, he may be mistaken in the inferences he has made. The question here will first be, has the plaintiff proved any agreement at all? I submit not. The plaintiff here nurses up two distinct equities or rights of action. If the son had sued the father the day after the will was made, the will would have been no defence. This brings the will at once within the words of Lord O'Hagan, in *Alderson v. Maddison*, L. R. 8 App. Ca. at p. 486. Even if the son did agree, he agreed on his own statement to take the chances of the will remaining the same. He himself said to the father: "You might revoke that will."

[BOYD, C.—You say then that an agreement to satisfy a claim by a devise, does not itself make the devise irrevocable?]

Yes. Now, assuming that the actual agreement is proved with certainty, is there such evidence as takes the case out of the Statute of Frauds? This is not a case in which you find the plaintiff in some position in reference to the property, which apart from the binding nature of the agreement set up, would place him in the position of a trespasser.

[BOYD, C.—The logical method in these cases is to start with some fact which requires explanation. Now what fact is there here that requires explanation?]

Exactly. You must find something unequivocally pointing to a contract: *Dale v. Hamilton*, 5 Ha. 369; *Britain v. Rossiter*, L. R. 11 Q. B. D. 123.

[BOYD, C.—But how could you get part performance of a contract with reference to making a will?]

I don't know. The making of the will itself could not be any evidence of a contract to make it, unless it recited the contract, or made some statement referring to it. The working after 1870 could not be evidence of part performance, because it is referable to the wages. Again, as to performance, the Court itself views possession of a son under his father in a different light to possession by a mortgagee.

N. Mills, also for the defendant.

M. Wilson, for the respondent. The Judge naturally enough believed the plaintiff, seeing the frank and honest way in which he gave his evidence. There is such evidence in writing as to take the case out of the Statute of Frauds viz., the wills of 1870 and 1873, and there was also sufficient part performance to take the case out of the statute; *Fry* on Spec. Perf., 2nd ed., secs. 256 and 559, and p. 262; *Parker v. Taswell*, 2 DeG. & J. 559; *Humfreys v. Greely*, L. R. 10 Q. B. D. 148; *Alderson v. Maddison*, *supra*. Even if the will of 1873 is the first will, it could not be revoked. I refer to *McDonald v. McKinnon*, 26 Gr. 12; *Roberts v. Hall*, 1 O. R. 388; *Coverdale v. Eastwood*, L. R. 15 Eq. 121. *McKay v. McKay*, 31 C. P. 1; *Parker v. Parker*, 32 C. P. 113; *Cook v. Grant*, 32 C. P. 511; *Black v. Black*, 9 Gr. 430;

Fitzgerald v. Fitzgerald, 20 Gr. 410; *Ockley v. Masson*, 6 A. R. 108; *Gillatley v. White*, 18 Gr. 1. The case of *Caton v. Caton*, L. R. 1 Ch. 137, was also referred to.

September 12th, 1883. BOYD, C.—In *Caton v. Caton*, L. R. 1 Ch., at p. 148, Lord Cranworth said: "The circumstance of the preparation and executing the will might afford strong evidence of the existence of the parol contract insisted on, if that were a matter into which we were at liberty to inquire; but it can have no effect in giving validity to an otherwise invalid contract."

The acts of part performance must be done by the plaintiff seeking to enforce the contract. Acts done by the other side at most go to prove the existence of an agreement, but a parol agreement, however satisfactorily established, is not enforced on that ground merely, when the case falls within the Statute of Frauds. Something more requires to be satisfactorily established by parol evidence, and that is acts of part performance by the plaintiff. The proper order of the marshalling the evidence is first to prove the part performance in order to let in parol evidence of the agreement, which is sought to be enforced. Now the acts of performance must be such as to manifest from their nature that there is some contract between the parties touching the land in question. As put by the Vice-Chancellor, in *Dale v. Hamilton*, 5 Ha. 369 "it is of the essence of such an act that the Court shall, by reason of the act itself, without knowing whether there was an agreement or not, find the parties unequivocally in a position different from that which, according to their legal rights, they would be in if there was no contract. * * But an act which, though done in pursuance of a contract, admits of explanation without supposing a contract, is not in general admitted to constitute an act of part performance taking the case out of the statute." Beyond the alleged execution of the will it is difficult to find any act of part performance here. But that was the act of the person whose estate is sought to be charged, and

the mere execution of a will is not significant as importing any contract, but merely indicates a benevolent intention displayed by the testator in the execution of an instrument essentially of a revocable nature. There is no evidence of any renunciation by the plaintiff of his right to sue for wages, if that were enough to except the case from the operation of the statute—rather does the evidence (p. 6) tend in a contrary direction. The pleadings put the case on the footing of a parol contract. Different considerations would have arisen, and different evidence would probably have been given if the frame of the action had been on a representation by the father that he had made a will, which being in satisfaction for the wages he agreed would be irrevocable.

But the pleadings as to representation in paragraph 6 of the claim do not go so far as this, and put it that the representation was that he had devised the land to the plaintiff, and so induced him not to enforce the claim for \$540. This, I do not think, is proved, even if it were sufficient to entitle the plaintiff to succeed. The will made as alleged in 1870, after the date of the settlement, is only spoken of by the plaintiff, and there is no corroboration of any such will being executed to affect the defendants. The Dicks speak of a will in 1873, which was not of an unincumbered estate, but subject to the life estate of the widow; and there is no sufficient evidence of any will giving the land in question to the plaintiff at the date he fixes when the settlement of accounts takes place between father and son.

The doctrine of part performance exempting the case from the operation of the statute, is one not encouraged by the trend of modern decisions. The strict boundaries of the law on this subject are emphatically fixed by the House of Lords, in *Maddison v. Alderson*, L. R. 8 App. Ca. 467. Our present decision but adopts the principles of law laid down in that case.

Having regard to the findings of the Judge of first instance, the fact that wages were owing to the plaintiff, and that the Statute of Limitations has barred his right

to relief against the executors, this is a proper case to exercise our discretion, and while allowing the appeal to dismiss the action, without costs, and to give no costs of appeal.

FERGUSON, J., concurred.

A. H. F. L.

[CHANCERY DIVISION.]

CULHANE V. STUART ET AL.

Trust—Following trust moneys—Earmark—Assignee for creditors—Holder for value.

Where C., an insolvent, had assigned all his assets and stock in trade to S., as trustee for creditors, and the plaintiff claimed a specific lien on the same to the extent of certain trust moneys, which had come into C's hands, as trustee and executor for the plaintiff, under the will of his (the plaintiff's) father, but had been wrongfully converted by C. to his own use, and employed in his own business to pay his trading debts, but as to which there did not appear to be any identity or connection with the stock in trade assigned to S.

Heid, that the plaintiff as against S., was only entitled to a dividend with the other creditors, on the full amount, with interest down to the time of the assignment.

THIS was an action brought by Stephen Culhane against James Miller Stuart and Joseph R. Cherrier, claiming that the defendants should be ordered to account to him regarding certain alleged claims and equities of his under the will of his father, to the extent, at all events, of the interest and liability of each of the said defendants in that behalf, and to pay and deliver over to him whatever upon such accounting he should be found entitled to, and his costs of suit, and for a reference to take such accounts, and further relief.

The father of the plaintiff died on March 30th, 1871, and his will was proved by the defendant Cherrier on April 27th, 1871. On January 6th, 1883, the defendant Cherrier conveyed all his real and personal estate to the defendant Stuart in trust to pay ratably and proportion-

ately all his, the said Cherrier's, creditors. This assignment was signed by a number of the creditors of Cherrier, but not by the plaintiff: and the plaintiff, in his statement of claim, submitted that he was, under the circumstances of this case, which are sufficiently stated in the judgment of Boyd, C., entitled to follow the trust estate and moneys, bequeathed by his father's will to the defendant Cherrier, as executor and trustee under the said will, into the hands of the defendant Stuart, and to make both defendants account to him for the same, and to pay to him all moneys which, upon such accounting he should be found entitled to.

The action was tried at the sittings at Hamilton, on October 3, 1883, before Boyd, C.,

Martin, Q. C., for the plaintiff. These are trust funds, which are in the hands of an assignee, which we are entitled to follow and lay hold of. The money went into the property of the debtor, and he, being a wrong-doer, everything must be presumed against him. If trust money has gone into an estate, and the trusts can no longer be followed and identified, then the trust attaches to the whole. I cite *Harris v. Truman*, L. R. 7 Q. B. D. 340, S. C., in App. 9 *ib.* 264; *In re Hallett's Estate*, *Knatchbull v. Hallett*, L. R. 13 Ch. D. 696; *Thompson v. Nelles*, 4 C. P. 399; *Taylor v. Plumer*, 3 M. & S. 562; *Wilson v. Owens*, 26 Gr. 27; *Dyer v. Dyer*, 2 Cox 95; *Taylor v. Taylor*, 1 A. R. 259; *Hopper v. Conyers*, L. R. 2 Eq. 549; *The Merchants' Express Co. v. Morton*, 15 Gr. 274; *Fleury v. Pringle*, 26 Gr. 67.

Mackelcan, Q. C., for the defendant Stuart. No property was ever impressed with any trust in this case. Cherrier bought goods, and sold them again before he got any trust money at all, and these goods he paid for by means of this trust money. But the property in question was not purchased with the trust funds. The plaintiff should be ordered to pay the defendant's costs as between solicitor and client.

October 10th, 1883. BOYD, C.—The facts are substantially these: the defendant Cherrier assigns all his assets and stock in trade to the defendant Stuart, to be ratably distributed for the benefit of all his creditors. The plaintiff claims to be a preferential creditor, or to have a specific lien upon the assets to the extent of over \$500, on the ground that this is the amount of a trust fund belonging to the plaintiff, which Cherrier improperly invested in his own business. Cherrier is executor of the estate of the plaintiff's father, and was directed to invest the money in question for the plaintiff, then and till July of this year an infant. Instead of making the investment he employed the money in his own business, and admits himself to be chargeable with interest at the rate of eight per cent. No doubt the plaintiff is entitled to judgment for the full amount, with interest at that rate, and costs as against the defendant Cherrier. But other considerations arise as against the claim to be paid in full out of the assets when the other trade creditors get only forty or fifty per cent. The argument for the plaintiff is briefly this, adopting the language of Lord Coleridge, in *Harris v. Truman*, L. R. 9 Q. B. D. 268: "a person placed in a fiduciary relation with another may have dealings of his own, and may mix up his own dealings with the dealings on behalf of his *cestui que trust*; but it has been held in Courts of equity, that when a fiduciary relation has been created in respect of a fund which has been misapplied, and when it cannot be shewn what portion of the proceeds of the fund is really subject to the trust, the trust shall be considered to be attached to the whole of the proceeds, and it shall not lie in the mouth of the trustee to say that any portion of those proceeds is not affected with the trust."

The evidence in this case establishes that the trust moneys were used by Cherrier in paying notes given for goods which he had obtained some four months previously. The witness Breeman, who knew all about the business, said: "the goods paid for would be all sold and disposed of by the time the trust money was applied to pay for

them. There would remain but the debt for those goods to be discharged." No doubt the argument for the plaintiff can be pushed to this extreme: the defendants' business was benefited by the application of the trust moneys—that fund went into his business, and the mere inability to earmark the proceeds of that fund, or to trace its devolutions in the course of the two years' business which has elapsed between its application to pay trade debts and the traders' assignment, is a difficulty created by the assignor of which his assignee cannot avail himself. The trader's assets are the mass or fund into which the trust money has gone, and while there are any assets left they should be impressed with a trust for the plaintiff's benefit.

But, however wide the *dicta* may be in the various cases, the question as to following trust moneys has always arisen with reference to the propriety of tracing such moneys to an ascertained fund, or into specific property, whether land or chattels. In *Harris v. Truman* the question was as to certain malt and barley seized by the trust creditors and claimed by the assignee in bankruptcy. It was proved that the malt and barley in question were paid for with the moneys of the fiduciary, and so the proceeds were allowed to be followed. It was said that there might be malt and barley purchased by the bankrupt mixed with the other, and it was to the argument based upon that supposition that the observations of the Lord Chief Justice which I have cited were addressed. The law is still, as laid down by Lord Ellenborough in *Taylor v. Plumer*, 3 M. & G. 562, that the product of or substitute for the original thing follows the nature of the thing itself as long as it can be ascertained to be such, and the right only ceases when the means of ascertainment fail. See per Jessel, M. R., in *Re Hallett's Estate*, L. R. 13 Ch. D. at p. 717. But if, as put by Page Wood, V. C., in *Frith v. Cartland*, 2 H. & M. 417, the trustee destroys a trust fund by dissipating it altogether, there remains nothing to be the subject of the trust. See L. R. 13 Ch. D. at p. 719. In a later case of *Ex parte Hardcastle*, 29 W. R. 616, in commenting on *Re*

Hallett, Bacon, C. J., said, "I take it that it is absolutely necessary that in all cases of this kind it should be distinctly made out that it is the trust fund in question."

So, in the present case, I fail to see any sort of identification or connection between the trust money used in paying the trader's debts in April, 1881, and the proceeds of the stock in trade in the hands of the assignee in 1883. The trust fund, in truth, was dissipated by the using of it to pay debts—it could not be followed after that into the hands of a holder for value. A similar point is adjudged by Sir W. Grant, in *Denton v. Davies*, 18 Ves. 499, where he held that the use of trust moneys to pay off part of a debt incurred in the purchase of land previously could not be represented as a purchase made with the trust money, and no trust could be fastened on the land.

The plaintiff is entitled to a dividend with the other creditors on the full amount due by the insolvent, computed with eight per cent. interest down to the date of the assignment: but I give him no costs except as against Cherrier; and Cherrier should also pay the assignee's costs, and if they cannot be made out of him they may be deducted from the fund.

A. H. F. L.

[CHANCERY DIVISION.]

MALCOLM ET AL V. HUNTER.

*Easement—Permissive origin—Diversion of Watercourse—Acquiescence—
Statute of Limitations—Onus.*

When one brought action to restrain the diversion of the water which supplied his mill, from the channel in which it had flowed for more than 20 years, and it appeared that the channel was an artificial cut, diverting the water from its natural outlet, and had been made originally at the instance, and by permission of the then owner of the creek, in which the water naturally flowed, partly for the benefit of the owner, who had however, on many occasions blocked up the cut, so as to turn the water to its natural outlet.

Held, that such an occupation would not give a statutory right to the licensee, and that the onus was on the plaintiff to make out his right, and show that there had been a change in the mode of user, after the origination by permission.

THIS was an action brought by Marcus Malcolm and George Harrison Malcolm against Samuel Hunter, seeking damages and an injunction.

By their statement of claim the plaintiffs alleged that they were the owners in fee of part of the north part of lot 1, concession 1, of the township of Oakland, in the county of Brant, on which was erected a valuable mill, used by them for the purpose of manufacturing woollen goods of various kinds: that the plaintiff Marcus Malcolm became the owner of the said lands and mill prior to the year 1859, and prior to the said George Harrison Malcolm becoming interested therein: that upwards of twenty-four years ago, with the consent of the then owner of the lands through which the same runs, who was also the owner of both the plaintiffs' and defendant's lands, to wit, one Eliakim Malcolm, an uncle of the plaintiff Marcus Malcolm, the latter diverted a stream or creek running in and upon a certain portion of the said lot and through from the southerly to the northerly side of the same, so that the said stream or creek flowed through the lands of the plaintiffs into a mill pond used for the purpose of propelling the water wheel which runs the said mill machinery; that the said stream or creek had been in continuous use by the said Marcus Malcolm ever since the diversion thereof as aforesaid, and the said Marcus Malcolm and his workmen and

servants had entered in and upon the said portion of the lot from time to time ever since for the purpose of cleaning out, and properly attending to the said creek; that they, the plaintiffs, would contend that they were of right entitled to have the water on the defendant's lands flow from his lands by means of the ditch or water-course into the plaintiffs' pond, and that the defendant's title to his said lands was subject to the said continuous easement in favour of the plaintiffs; that about February, 1882, the defendant purchased the south portion of the said lot 1, adjoining the plaintiffs' property, and entered into possession of the same, and proceeded to undermine and divert the said stream or creek so that the same instead of flowing through the lands of and into the mill pond of the plaintiffs' was entirely diverted therefrom, and the plaintiffs in consequence lost the power derived from the water of the said stream or creek and were greatly injured; that the plaintiffs had notified the defendant to desist from such action, and to restore the stream to its original channel made by the plaintiff, Marcus Malcolm, but the defendant had refused so to do; that they, the plaintiffs, claimed title by prescription and user as aforesaid for upwards of twenty years to have the water of the said stream or creek flow in the channel to which the same was diverted as aforesaid by the plaintiff, Marcus Malcolm; and the plaintiffs claimed \$400 damages for the loss of water so diverted by the defendant and for the wrongful acts and grievances above mentioned; an injunction, mandatory and otherwise, ordering the defendant, his servants and agents to abstain from interfering with the flow of the water, and from preventing the water from flowing in the course it ought to have done, through the said ditch or water course, and commanding the defendant to open and restore the ditch and water course to its original channel made by the plaintiff, Marcus Malcolm, and to put and keep the same in a state of repair to carry the water to the plaintiffs' lands and mill pond; and for general relief.

By his statement of defence the defendant denied that the plaintiffs or either of them were entitled to the easements or rights claimed by them in the statement of claim, or any of them, on any of the grounds therein set forth; or that they, or either of them, had for twenty years enjoyed as of right and without interruption any such easement or right. He alleged that he purchased the lands owned by him mentioned in the statement of claim at an auction sale thereof, and at the time he so purchased had no notice or knowledge that the plaintiffs claimed any easement over such lands: that the vendors did not in the conditions of sale nor in the published notices of the said sale make any reservation of any easement of which the plaintiffs had notice, nor did they notify the defendant of any such claim though present at the sale, and he submitted they were thereby estopped: and further that he was a *bond fide* purchaser for valuable consideration without notice of the claim of the plaintiffs. He also claimed the benefit of the Registry Acts in bar of the relief sought by the plaintiffs, and that the plaintiffs by their delay and laches had disentitled themselves to any relief, and submitted that they had not in their claim shewn any case entitling them to maintain this action, and claimed the same benefit as though he had demurred.

The case was heard and witnesses examined at Brantford, on September 27th, 1883, before Boyd, C.

A. J. Wilkes, for the plaintiffs. There was no interruption of the user by any one to the knowledge of the plaintiffs. The evidence of interruption, indeed, with the plaintiffs' right is evidence only of a temporary interruption: *Washburn* on Easements, 2nd ed., secs. 351-2.

J. E. Lees, for the defendant. The evidence shows that the watercourse in question was made for agricultural purposes. Its existence for twenty years can give no right of user to the neighbouring proprietor. *Mason v. Shrewsbury and Hereford R. W. Co.* L. R. 6 Q. 578; *Greatrex v. Hayward*, 8 Ex. 291; *Wood v. Wand*,

Ex. 748. The evidence shows that the user of this watercourse by the plaintiff, has not been as of right, as required by the statute, but has been permissive: *Wind v Wind*, *supra*; *Bright v. Walker*, 1 C. M. & R., 211; *Arkwright v. Gell*, 5 M. & W. 203; *Beasley v. Clarke*, 2 Bing. N. C., 705; *Onley v. Gardiner*, 4 M. & W., 496; *Gaved v. Martyn*, 19 C. B. N. S. 732. The use has been interrupted, and has not continued to the time of bringing the action. *Gale v. Abbot*, 8 Jur. N. S. 987; *Lowe v. Carpenter*, 6 Ex. 825. The plaintiff having attended the sale when the defendant purchased the land with the watercourse in question, and having permitted him to become the purchaser without notice, and in ignorance of any claim on his part is now estopped from setting up his right. I also refer to *Monmouthshire Canal Co., v. Harford*, 1 C. M. & R., 614; *Shelford's Real Prop. Stats.*, 5th ed. pp. 7, 11; *Wright v. Williams*, 1 M. & W. 77; *Richards v. Fry*, 7 A. & E., 698; *Medford v. Pratt*, 4 Pick. 222; *Sargent v. Ballard*, 9 Pick 251; *Arnold v. Stevens*, 24 Pick. 106.

Wilkes, in reply, referred to *Washburn* on Easements 2nd ed., p. 137; *Regina v. Malcolm*, 2 O. R. 511.

The learned Chancellor forthwith gave judgment in the plaintiff's favour, except as to two points, viz., when the Statute of Limitations began to run, and as to acquiescence.

On the following day, on application being made by the plaintiffs for leave to adduce further evidence of acquiescence, the learned Chancellor gave the desired leave, parties to arrange how the evidence should be given.

The parties then agreed that the further evidence should be taken before the Local Master at Brantford, and it was accordingly so taken on October 1st and 2nd, 1883, and on October 9th following it was put in.

Counsel also put in at the same time written arguments on behalf of the plaintiffs and defendant respectively.

In his written argument counsel for the plaintiff, as to the time when the statute commenced to run, referred to

Tickle v. Brown, 4 A. & E. 369. As to the submission to and acquiescence in the interruption of the plaintiffs' rights, he referred to *Flight v. Thomas*, 11 A. & E. 688; and to *Bennison v. Cartwright*, 5 B. & S. 1.

Counsel for the defendant advanced the following as the true construction of the words "acquiescence" and "submission":—"These words have reference to the state of mind with which the person whose rights are interfered with views the interruption. If, knowing of the interruption he is willing that the enjoyment of his right for the time should be discontinued, he acquiesces. If on the other hand, he is aware of the interference but is forced to allow it, takes no active steps to assert his right, and does not communicate to the person who is interfering with his rights his discontent with what is being done and his intention to assert his rights, he submits. Mere complaining, grumbling, or expressing dissatisfaction to a third party will not save the plaintiff's rights, nor will any feeling which he may have in his own mind affect the matter. It is impossible to get at what may be in the plaintiff's mind except through his acts." He then commented on the evidence and referred to *Regina v. Malcolm*, 2 O. R. 511; *Lowe v. Carpenter*, 6 Ex. 825; *Gale v. Abbott*, 8 Jur. N. S. 987.

October 10th, 1883. BOYD, C.—*Gaved v. Martyn*, 19 C. B. N. S. 732, very nearly approaches this case in its circumstances. In giving judgment Willes, J., said: "A plaintiff who is seeking to establish an enjoyment for the statutable period of twenty years, must make out that his enjoyment has been under a claim of right. And I apprehend it would clearly be competent in answer to such a claim, to shew that the enjoyment originated under an agreement with the tenant or owner of the servient tenement, and therefore was precarious, and not as of right; and upon proof of that fact it would be for the jury to say whether the tenant of the servient tenement had not continued the enjoyment in pursuance of a similar agreement, and whether

it was not precarious." Here we find an artificial cut diverting the water in the spring now owned by the defendant from its natural outlet, made at the instance of the then owner of the spring in 1860, in order to give a better supply of water to the mill of the plaintiff, who was his nephew, and in part to supply some drainage to the uncle's land. That is by the plaintiffs' own admission the origin of the water course now in dispute, and a great many circumstances induce the conclusion that the subsequent user continued upon the same footing. The onus is on the plaintiff to make out his right, and to shew that there was a change in the mode of user after its having originated by the permission of his uncle. The uncle on many occasions blocked up the cut so as to turn the water to its natural outlet, when his land was overflowed on account of this cut being choked with weeds or otherwise obstructed. The uncle said, soon before his death in 1874, that he would have to charge his nephew for the use of this water, and told the present defendant before he bought, that the plaintiff had no right to the water.

It is clearly proved that the water course helped to drain the uncle's land as well as to supply water to the mill, and when by reason of the plaintiffs' failing to clean it out, the uncle's land would be flooded, he would take the remedy into his own hands and cut off the supply. The plaintiffs would turn it on again: but this none the less indicates that the water was for their joint benefit, and it is a course of conduct covering many years, which affords cogent evidence of a permissive user on the part of the owner of the servient tenement. There is a dictum of Alderson, B., in *Kinloch v. Nevill*, 6 M. & W. at p. 806, that "if a parol permission extends over the whole of the twenty years, the party enjoys the way as of right and without interruption for the twenty years; not so, if the leave be given from time to time within the twenty years." Whatever may be the meaning of this as an exposition of the words in the statute, it is clear that such an occupation would not give a statutory right to the licensee at the end of twenty years, as

is expressly pointed out in *Bright v. Walker*, 1 C. M. & R. at p. 219, and is expressly decided in *Gaved v. Martyn*, *supra*; so also in *Beeston v. Weate*, 5 E. & B. 986, and by Erle, J., in *Eaton v. Swansea Waterworks Co.*, 1 Q. B. 275; Coleridge, J., in *Holford v. Harkinson*, 5 Q. B. 588, and by Blackburn, J., in *Mason v. Shrewsbury and Hereford R. W. Co.*, L. R. 6 Q. B., at p. 584. Upon this ground alone which is in my judgment sufficient, I dismiss the action, with costs.

A. H. F. L.

[QUEEN'S BENCH DIVISION.]

SRIGLEY V. TAYLOR.

Election—Disqualification for voting—R. S. O. ch. 10, sec. 4—Agent for the sale of Crown lands—R. S. O. ch. 24—The Public Lands Act R. S. O. ch. 23.

By order in council the defendant was appointed agent for the location and sale of lands under the Free Grants and Homesteads Act, R. S. O. ch. 24. By letter from the Crown Lands Department the defendant was instructed to enter upon his duties respecting the location of free grants, but not to sell lands or receive money until he had given the usual security. By R. S. O. ch. 10, sec. 4, all "agents for the sale of Crown Lands," amongst other persons, are disqualified from voting at elections for the Legislature, under a penalty. The defendant before he had given the necessary security, voted at an election for the Legislature.

Held, that he was an agent for the sale of Crown Lands within the meaning of the Act, R. S. O. ch. 10, sec. 4, and therefore liable to the penalty imposed. Whether or not the defendant was such an agent is a question of law and not a question for the jury.

ACTION for a penalty, for that the defendant, at an election for a member to serve in the Legislative Assembly of Ontario for the District of Muskoka and Parry Sound, holden on the 18th of March, 1883, being then a public officer in the employ of the Ontario Government, to wit, an agent for the sale of Crown Lands in the said district, and disqualified and incompetent at the said election, voted at the said election contrary to the provisions of R. S. O.

ch. 10, and thereby became indebted to the plaintiff in the sum of \$2,000.

The defendant denied the allegations in the statement of claim.

He denied also that he was, at the time of the election referred to, a public officer in the employ of the Ontario Government, or an agent for the sale of Crown Lands, or disqualified and incompetent to vote at the said election, as alleged.

Issue.

The action was tried at Toronto before the present Chief Justice of Ontario.

The following evidence was given :

By order in Council of the 15th of December, 1881, the defendant was appointed "agent for the location and sale of lands under 'The Free Grants and Homesteads Act,' and the regulations made thereunder on the 27th May, 1869, in the Townships of Brunel, Baxter, Chaffey, Draper, Franklin, Macaulay, Medora, Monk, Morrison, Muskoka, McLean, Oakley, Ridout, Ryde, Sinclair, Stephenson, Stisted, Watt, and Wood, in the said District of Muskoka," the office of the said Taylor to be at the Village of Bracebridge.

By an order in Council of the 27th of May, 1869, sec 1, provision was made for locating to any person as a free grant under "The Free Grants and Homesteads Act of 1868, 100 acres of land, or in certain cases not more than 200 acres."

Sec. 2. "Any locatee under the Act, being the male head of a family, having children under eighteen years of age residing with him, shall be allowed to purchase an additional 100 acres at 50 cents per acre cash at the time of location, subject to certain conditions."

Sec. 3. "Squatters upon land situate within any township or part of a township appropriated to free grants, and who had settled or improved upon such land before the passing of The Free Grants Act, shall be allowed to purchase said land, not exceeding 200 acres, to any one person, at 50 cents an acre cash, subject to certain conditions."

The other sections are not necessary to be referred to.

On the 21st of December, 1881, the Assistant Commissioner of Crown Lands wrote to the defendant a general letter of instructions, part of it being as follows :

"Referring to the department letter addressed to you on the 14th instant, notifying you of your appointment as Crown Land Agent at Bracebridge for the location and sale of free grant lands, under the provisions of the Free Grants and Homesteads Act, and the regulations made thereunder, I have to inform you that upon receipt from your predecessor of the books, lists, maps and papers connected with the office you may enter upon its duties so far as regards the location of free grants, but you are not to sell lands or receive any money on account of lands sold or otherwise, until you have given security for the due accounting of such moneys and the due performance of the duties of the office."

The last and tenth section of the letter was :

"Your remuneration as agent will be by salary, which has been fixed at \$500 per annum, and it is to be understood that should your services cease hereafter to be required from any cause whatever, or the extent of your agency be changed, or the salary of your office be diminished, you will have no claim upon the government for indemnity."

The letter was addressed to the defendant as "Crown Land Agent, Bracebridge."

Mr. Johnson, the Assistant Commissioner of Crown Lands, said the defendant, he believed, "is Crown Land Agent for the location of free grants in Bracebridge. The instructions are to sell to free grant settlers only. He acts as agent, and makes returns to the Crown Land Office. He has gone on acting the same as any other Free Grant Agent. He is agent ; he has acted as such since December, 1882."

In cross-examination the witness was asked :

Q. "Does a Free Grant Agent make sales, or does he forward the application to the Department to act on?"

A. "He makes sales when entitled, and if in difficulty asks instructions from the Department. I have recently learned the defendant's bond has not been perfected."

Q. "He acted in locating under the Free Grants Acts ?

You have a Crown Lands' Agent and a Free Grants' Agent—two distinct offices?

A. "Yes; the one paid by salary and the other by commission. The ordinary Crown Land Agent is not authorized to locate free grants at all; he is paid by commission: Free Grants Agents are paid so much per annum, and have no other fees."

On re-examination he said:

Q. "What are called free grant lands are lands of the Crown that are appropriated for free grants?"

A. "They are appropriated for free grants under the Free Grants and Homesteads Act."

Q. "The Free Grants and Homesteads Act and the Public Land Act are all one Act?"

A. "Well, they are consolidated, but they are attached to different places."

Q. "And they [the Free Grants Lands] are Crown Lands still to all intents and purposes?"

A. "Well, they are Crown Lands. They are sold under The Free Grants Act."

Osler, Q.C., contended there was no case to go to the jury; that the defendant was not *an agent for the sale of Crown Lands*, which were the words used in the R. S. O. ch. 10, sec. 4, prohibiting the persons therein described from voting: that the defendant was an agent for the location and sale of lands under the Free Grants and Homesteads Act, and his power of sale was withdrawn from him 'until you have given security for the due accounting of all moneys, and the due performance of the office,' and that security he had never given; and that the examination of the defendant before the trial should not be received because the examination should not have been directed, as this was a penal proceeding. The learned Chief Justice overruled the objections, preferring to leave the facts to the jury, saying the defendant could have relief upon the legal objections he had taken. There were two questions left to the jury. 1. Did the defendant vote at the election? 2. If so, was he at that time an agent for the sale of Crown Lands? The jury did not answer the first question, because it did not seem to have been disputed, and

the fact of voting was proven; and the second question they found for the defendant, and they gave their verdict accordingly.

May 21, 1884. *Arnoldi* obtained an order *nisi*, calling upon the defendant to show cause why the verdict and judgment for the defendant should not be set aside and a new trial granted: 1. For that the matters left to the jury should have been decided by the learned Chief Justice, and should not have been left to the jury. 2. That the verdict was contrary to the Judge's charge, and was perverse. 3. That the verdict was contrary to law and evidence, and the weight of evidence; and, 4. Because, upon the whole case, the verdict should have been for the plaintiff. And why, in the case of a new trial, the action should not be tried without a jury.

The plaintiff also served a notice of motion to the like effect.

June 5, 1884, *Osler*, Q. C., shewed cause. The second is the only ground in the order *nisi* that is arguable. *Crandell v. Nott*, 30 C. P. 63, shows that a new trial will not be granted because the verdict is against the evidence and weight of evidence in penalty cases. Then, is the verdict here perverse, contrary to law? The statute is to be construed strictly. The words of sec. 4, ch. 10, R. S. O., are, "Agents for the sale of Crown Lands," and not "Crown Lands Agents." Defendant here can only sell to actual settlers by pre-emption right. He is appointed under The Free Grant Lands Act. He has no discretion to refuse purchases. Further, defendant never received any money. Could he have made a contract to bind the Crown, even if his bond had been perfected? *Law Society of the United Kingdom v. Shaw*, 9 Q. B. D. 1, is in point. See also *Wilberforce* on Statutes, pp. 250, *et seq.*; *Maxwell*, 321, 324, 328. The Interpretation Act, R. S. O., cannot enlarge a penal statute. See also *Dear v. Wes. Ass. Co.*, 41 U. C. R. 555. This was not a case in which discovery could be had; so depositions are not admissible. *Hunning v. Williamson*, 10 Q. B. D. 459, shews that the Judicature Act does not

enlarge the scope of discovery. Though defendant submitted, it is not evidence *per se*: it must be proved as any other admission, which was not done. The very extreme nature of the penalty must be looked at.

Arnoldi, contra. As to the difference between the two classes of agents. The Free Grants Acts, ch. 24, secs. 3, 4, &c., and ch. 23, secs. 12 and 13 compared, shew that free grants could be made. This appointment was made under sec. 7. The statute sued on is not to be taken as defining strictly the officer in question. Section 14 of ch. 23 shews that no agent has any discretion. All Free Grant Lands are Crown Lands. The agent of free grants receives a salary. The giving security is not a condition precedent. As to the depositions, he contended that it is not like a witness called by the plaintiff, and then cross-examined: that *Law Society v. Shaw* was not applicable, as there was no appointment in that case, and that *Hunning v. Williamson* shewed what defendant should have done; and no objection having been made, the depositions were now admissible like any other evidence.

June 27, 1884. WILSON, C. J.—The only question is, whether, upon the evidence the defendant was, at the time he voted at the election, “an agent for the sale of Crown Lands?” The words used in the R. S. O. ch. 10, sec. 4, containing the list of persons who are disqualified from voting, are the only words which are in any way applicable to him. The defendant was appointed “an agent for the location and sale of lands under the Free Grants and Homesteads Act,” situate in a number of named townships in the District of Muskoka.

That Act is ch. 24 of the R. S. O. The free grants and homestead lands are Crown Lands. They are called “Public Lands” in section 3, and the Act itself, by section 1 it is declared, “shall be taken and read as part of ‘*The Public Lands Act*.’”

Then, by ch. 23, the term, “The Public Lands’ Act,” it is declared, “shall be held to apply to lands heretofore

designated or known as Crown Lands—School Lands or Clergy Lands—which designation, for the purposes of administration, shall still continue.”

The free grants and homestead lands are plainly *Crown Lands* and *Public Lands*. By section 7 of that Act the Lieutenant Governor has the appointment of officers and agents to *carry out this Act*, which, as before mentioned, contains within it, as part of it, the Act relating to free grants.

Section 15 of ch. 23 expressly mentions free grant land as Public Land; and other sections of the same Act plainly apply and extend to free grant lands.

Under these facts I should say, without any doubt, that the defendant, under his appointment as *agent for the location and sale of lands under The Free Grants and Homesteads Act*, was and is an agent *for the sale of Crown Lands*, and was and is within the prohibitory terms of R. S. O. ch. 10, sec. 4, and was disqualified from voting.

But that is not the whole of the question. The appointment was to *locate* and to *sell*; but the defendant was expressly told by instructions sent to him from the head of the department, that although he might enter upon the duties of his office, “you are not to sell lands or receive money on account of lands or otherwise until you have given security for the due accounting of all moneys and the due performance of the duties of the office.”

That was in pursuance of ch. 23, sec. 8, that the Lieutenant Governor in council “shall require from * * * every agent appointed under him,” [the Commissioner of Crown Lands] “security for the due performance of his duty.”

When that power of sale was withdrawn from the defendant, was he an agent for the sale of Crown Lands?

If he had been appointed only to *locate* settlers, he would not have been within the words of the Act.

So, also, if after being appointed to *locate* and to *sell*, the power of sale had been taken away from him. Is there any difference between the withdrawal of the power of

sale altogether and the withdrawal of it for a particular period, say for a month, or the suspension of it until the required security for the performance of the agent's duty is perfected?

The prohibitory clause against voting gives the class or designation of persons who shall be disqualified from voting; and in that class and designation are the "agents for the sale of Crown Lands." The defendant was appointed to be such an agent, and by that appointment he came within the prohibited class. Was he, by the suspension of part of his duties, the power to sell, removed from out of that class? If he had been directed not to sell until he got possession of all the office books from his predecessor, and before he got possession of them an election was held, would he be disqualified from voting? or in other words, would he at that time be an agent for the sale of Crown Lands?

While his salary was going on he would be an agent of the government. What kind of an agent? That would be according to his appointment. In this case he would be an agent, bearing the description or designation of an agent for the sale of Crown Lands.

If a person were elected to an office, say that of alderman, but was forbidden from acting as such until he had taken the oath of office, no other election could be held for that office upon the ground that the person elected had not taken the oath, because the office would in fact be full until it was declared to be vacant. So a person may be a member of Parliament, it is said, although he has not taken the prescribed oath, and may do several acts as a member without being subjected to any penalty so long as he does not sit during a debate or vote in the house. I have felt very great doubt in this case, but I think a person may be and may come within the designation of a person who is an agent for the sale of Crown Lands, although he is directed not to exercise that particular power for a certain time, or until the happening of a particular event, so long as his original appointment creating him an agent for

the sale of Crown Lands is not wholly revoked, and he is still continued in office under that appointment, and receiving his salary or remuneration as such officer.

It is somewhat incongruous to say that a person is an agent for the sale of Crown Lands, who has not for the time the power to make such sales, for it is difficult to be such an officer without the power to exercise the duty of the office.

In this case the power is suspended only, and it happens that it is the defendant who is himself suspending it by his neglect to give the security required of him for the performance of his duty; and yet he retains his appointment, and is deriving all the benefits of his office as if he had given the security, and were in the full exercise of all the functions of the office.

I have no doubt that an agent, restricted from selling Crown Lands after four o'clock in the afternoon, or only on particular days, would be an agent for the sale of lands at all hours and upon all days; that is, he would be the person who filled the office of agent for the sale of Crown Lands, and that is what, after some doubt, I think the defendant was; that is, he was the person who filled the office and came within the designation of "an agent for the sale of Crown Lands," although he was not to sell such lands until he gave the security required, just as if he had been directed not to sell for any temporary period, and was not, and had not been personally prohibited from selling or prohibited for such a length of time that virtually he was interdicted from performing that particular duty.

If any other construction be placed upon this Act it would enable any such agent who, for any cause or for any purpose, was suspended from selling for a few days, to vote with impunity, and in direct violation of the spirit and object of the Act, that object being the prohibition of a certain class of Government officials from taking any part in these popular political elections.

The finding of the jury, that the defendant was not an agent for the sale of Crown Lands, was against the law and

evidence, and against the charge of the learned Chief Justice, and it was and is a finding upon a question of law; and as we have before us all the materials necessary for finally determining the question in dispute, we may give judgment at once, and that judgment is that the finding of the jury, that the defendant was not an agent for the sale of Crown Lands, and the judgment given thereon, be set aside, and that the issue upon the defendant being or not being such agent at the time of the said voting be entered for the plaintiff; and that the rule and notice of motion of the plaintiff be made absolute for the entry of judgment upon the said issue, and also upon the issue that the defendant did vote at the said election, and that the plaintiff do recover from the defendant the said sum of \$2,000 and the costs of the action, and of the said order *nisi* and notice of motion.

OSLER, J. A., concurred, and read a judgment, which was not handed to the reporter.

Order absolute accordingly.

[CHANCERY DIVISION.]

WYLD V. HAMILTON MUTUAL INSURANCE COMPANY.

Dominion Winding-up Act—Company insolvent before the date of the Act—Retroactive operation—45 Vic. ch. 23 D.

Held, that 45 Vic. ch. 23 D. is retroactive in the sense of applying to companies which have become insolvent before the date of that Act.

THE Hamilton Mutual Fire Insurance Company being in insolvent circumstances a bill was filed in Chancery by Edwin Wyld on behalf of himself and all others the creditors of the said company against such company, and a decree was made on the 15th day of June, 1881, for the winding up of the company and directing the appointment of a receiver.

Owing to certain difficulties having been experienced in the collection of the assets of the company a petition was subsequently filed by the said Edwin Wyld for the winding up of the company under the provisions of 45 Vic. ch. 23, D., and on February 7th, 1883, a winding up order was made thereon, and a reference directed to the Master at Hamilton to settle a list of the contributories of the said company.

John Bunton, one of the alleged contributories, then made this application to the Court, by way of petition, for an order staying all proceedings under the winding-up order upon the ground that the Act 45 Vic. ch. 23, D. is not retrospective, and consequently only applies to companies which became insolvent after the passing of the Act, viz: the 17th day of May, 1882, and did not apply to the company in question, and the Court was not empowered under the said Act to settle a list of contributories of the said company, and to make assessments on the premium notes of the former members of the said company, and asking that the order might be rescinded, cancelled, and discharged.

The motion was heard before the Chancellor on June 19th, 1883.

W. Laidlaw, for the petitioner, cited *Maxwell* on Statutes, 1st ed. p. 191-2; *Martindale v. Clarkson*, 6 A. R. 1; 45 Vic. ch. 23, sec. 3, 13, 19, 22.

McCarthy, Q. C., for the plaintiff, cited *Maxwell* on Statutes, 1st ed. p. 198, 200; 45 Vic. ch. 23, D. secs. 1 and 3; *Wright v. Hale*, 6 H. & N. 227; *The Ironsides*, Lush 438; *Kimbray v. Draper*, L. R. 3 Q. B. 160; *Regina v. Vine*, L. R. 10 Q. B. 195; *Rè Tate*, 5 C. L. J. N. S. 260.

F. Fitzgerald, for the company.

June 20th, 1883. *BOYD, C.*—The sole point I have to determine is, the applicability of the Winding-up Act of the Dominion, 45 Vic. ch. 23, to the defendants. They were a Mutual Insurance Company, which within the meaning of the Act sec. 9, was insolvent (by reason of not being able to pay its debts as they became due) before the date of the Act, May 17th, 1882. It had ceased to carry on business before the end of 1881, and it is urged that for this reason it is excluded by the interpretation clause sec. 3. But by the "application of the Act," under the first section, it extends to incorporated insurance companies, "which are insolvent," language comprehensive enough to embrace the company in question. The interpretation clause does not control this section, but is only meant to define the character of insurance business which is within the Act. There are liabilities of the company which cannot be met even in part because there is no means apart from this Act of reaching the payees of the premium notes through the medium of an assessment. The machinery of the Act supplies a remedy in this direction, and for this reason if a retroactive construction were necessary to support the proceedings in this action, I should deem that a proper construction of the Act: *Maxwell* on Statutes, 1st ed. pp. 199, 200.

The application is dismissed, with costs.

A. H. F. L.

[CHANCERY DIVISION.]

GILROY V. McMILLAN.

Lease—Parol Agreement—Evidence to vary written document.

The plaintiff sought to restrain the defendant from cutting timber on lands demised to him, contrary to the covenants in the indenture of lease. At the trial the defendant tendered parol evidence of an agreement between himself and the plaintiff, distinct from and prior to the lease, which, he contended, modified the restrictions in the lease, and gave him the right to cut the timber. *Held*, (affirming the decision of FERGUSON, J.), that the evidence of the parol agreement could not be admitted.

IN his statement of claim in this action the plaintiff James W. Gilroy alleged that on November 1st, 1877, he leased by deed certain lands to the defendant John McMillan, on certain covenants and conditions, for a term of years commencing April 1st, 1878: that amongst the covenants therein contained was one by the defendant that he would not at any time during the term cut any timber on a certain portion of the said demised premises, or allow any timber to be removed therefrom at any time during the term, except timber for firewood and fencing and repairs: that a right of re-entry was reserved to the plaintiffs on breach of the covenants in the lease: that the defendant entered on and was in possession of the demised lands under the above lease: that the defendant in breach of his covenant was cutting large quantities of the timber: and the plaintiff prayed an injunction to restrain such cutting of timber, and damages.

In his statement of defence the defendant admitted the execution of the said lease, but in the 3rd and 4th paragraphs thereof, he alleged as follows:

3. "At the time when the agreement for said lease was entered into between the plaintiff and defendant, the plaintiff informed the defendant that he desired to preserve all the timber on the seventy acres of the demised premises only which belonged to the estate of the late M. A. Gilroy, and in which seventy acres the plaintiff had only a life estate, but with respect to the residue of said demised

premises, no agreement was made with the plaintiff that the defendant should not cut timber thereon, except as to standing green timber which the defendant was not to cut

* * ,” and he alleged he had acted conformably with this.

4. The defendant alleges that at the time when the said agreement to lease was made, and when the said lease was drawn, the farm in question was in a very bad state of cultivation, and it was agreed in consideration thereof that the defendant should have a reduction of \$10 in money off the first year's rent in consideration of such bad state of the farm, and should in addition be entitled to have all the dead and down timber on a certain ridge running through fifty acres of the demised premises owned by the said plaintiff, and the defendant alleges that this agreement as to the said timber was an agreement distinct from and independent of the lease, and he was to be entitled if he desired, to take the said timber before his term under the said lease commenced to run, and he did in fact so cut and removed a great portion of the said timber before the commencement of said term * *”: and he denied that he had committed a breach of the stipulations and covenants in the lease.

The plaintiff's reply was as follows :

“The defendant pretends that at the time the lease was made to him by the plaintiff of the demised premises an agreement was made between the parties respecting the timber in the said lease referred to, distinct and separate from the agreement set forth in and by the said lease but the contrary of this pretence is the truth, and the plaintiff submits that it should be held by this honourable Court that the agreement as reduced to writing and executed by the parties under their hands and seals (evidenced by the said lease), contains the whole agreement between the parties, and so the said defendant has often admitted, and no parol evidence should be admitted to vary the same, and the plaintiff claims the benefit of the Statute of Frauds as an answer to the defendant's defence as to such separate

agreement, the same, if any, not having been reduced to writing."

The action was tried at Toronto, before Ferguson, J., on May 14th, 1883, and in the course of the trial the defendant tendered evidence as to the agreement referred to in the 4th paragraph of the defendant's answer, and made between the parties prior to the lease: evidence to prove a parol agreement outside the lease in regard to the timber on the fifty acres.

The evidence was objected to on the ground that the matter was reduced to writing and appeared in the shape of the lease, and no agreement could be shewn except as evidenced by the lease.

His Lordship ruled the evidence could not be given, and the deed alone could be looked at for what the agreement was, and subsequently on May 18th, 1883, he gave judgment for the plaintiff.

On September 6th, 1883, the defendant moved by way of appeal from this judgment to the divisional court, on the ground that the judgment appealed from was contrary to the law and to the weight of the evidence, and on the ground of the improper rejection at the trial of the evidence tendered to prove a parol agreement between the plaintiff and the defendant for cutting so much of the timber as had been cut by the defendant, and on the ground that even if such evidence was properly rejected as to the proof of the existence of such parol agreement, it should have been received as to timber already cut, to prove the leave and license to cut from the plaintiff to the defendant, and the acquiescence of the plaintiff therein.

B. B. Osler, Q.C., for the appellant. We should have been allowed to adduce evidence of the parol agreement or stipulation, and that it was a condition of the lease, but was intentionally omitted from the written lease. At any rate evidence may be given of a parol license, excusing a trespass, between the date of the execution of the lease, and the beginning of the term: *Cornish v. Stubbs*, L. R. 5 C. P.

334; *Mellor v. Watkins*, L. R. 9 Q. B. 400. I refer also to *Morgan v. Griffith*, L. R. 6 Exch. 70; *Erskine v. Adeane*, L. R. 8 Ch. 756; *McGinness v. Kennedy*, 29 U. C. R. 93; *Fitzgerald v. The Grand Trunk R. W. Co.*, 4 App. R. 601; S. C. in App. 5 S. C. R. 204; *Chamberlain v. Smith*, 21 U. C. R. 103; *LaRoche v. O'Hagan*, 1 O. R. 300; *McGregor v. McNeil*, 32 C. P. 538; *Summers v. Cook*, 28 Gr. 179; *Woolfe v. Horne*, L. R. 2 Q. B. D. 355. *In re Mason and Scott*, 21 Gr. 166, S. C. in App., 22 Gr. 592, there was no distinct agreement there as here.

S. H. Blake, Q. C., for the respondent. There is a complete agreement in the lease as to all the matters in question. We complain of what has been done since the lease became operative.

September 7th, 1883. BOYD, C.—If the question was as to the right of the defendant to take the timber from the ridge after the execution of the lease, and before the term began then the rejected evidence should, perhaps, have been admitted. But whatever were the rights under the alleged parol agreement prior to the entry under the lease, the exercise of these rights became inconsistent with the written agreement expressed in the lease. That writing provides for the trees and timber in question, and gives only a limited right of user, and is repugnant to the contention that there was absolute property in that part of the timber on the ridge. To admit the evidence of the parol bargain in this aspect of the case would be to disregard *Mason v. Scott*, 22 Gr. 592. This way of putting the case is most favourable to the defendant. But I think the true view of the pleadings and character of the transactions is, that there was but one bargain for the lease, and that the alleged parol agreement as to the timber was not collateral at all. The agreement as argued was to give the land from April, and as an inducement to take it in a bad state of cultivation, ten dollars was thrown off the rent, and this ridge timber thrown in. Part of this

bargain is expressly mentioned as to the ten dollars (a), the other part is not stated in the writing, and what appears in the writing in the last clause is inconsistent with it (b).

PROUDFOOT, J., concurred.

Appeal dismissed, with costs.

A. H. F. L.

(a) His Lordship is here alluding to the following words in the *reddendum* of the lease: "A deduction of ten dollars to be made off the the first year's rent in consideration of bad state of farm."

(b) This clause was as follows: "And it is hereby agreed between the said lessor and lessee that the lessee shall be entitled to cut and take down timber, and dead timber of the northern fifty acres off the said demised premises for firewood and other purposes, on the demised premises."

[CHANCERY DIVISION.]

DUNN V. THE BOARD OF EDUCATION OF THE TOWN OF WINDSOR.

Mandamus to admit a child to a public school--Want of accommodation--Public School Regulations ch. 10, secs. 6, 7--Necessity of conformity thereto.

A mandamus to compel the admission of a child to a public school will not be granted where it is shewn that there is not accommodation for her, for this is a valid answer to such an application, especially where it appears, as here, that there is sufficient accommodation at another public school in the same town; nor where it is shewn that the application for admission was not made in the regular and proper way, under the Public School Regulations, as was the case here, inasmuch as, although the child in question was a registered pupil at the other public school in the same town during the preceding term, she had not attended there at the commencement of the present one, nor had application been made to the inspector to have her admitted to the school to which admission was now sought.

THIS was an application on motion for an order for a mandamus compelling the defendants to admit Jane Ann Dunn, the child of the plaintiff, into a certain public school in the town of Windsor, and to duly register her and receive her as a pupil in the said school.

The facts of the case and the arguments of counsel sufficiently appear in the judgment.

The motion was made on October 2nd, 1883, before Ferguson, J.

N. W. Hoyles, for the motion, referred to *Re Hutchison and The School Trustees of St. Catharines*, 31 U. C. R. 274; *Re Stewart and The School Trustees of Sandwich East*, 23 U. C. R. 634; *Washington v. The School Trustees of Charlotteville*, 11 U. C. R. 569; *Re Dennis Hill v. The School Trustees of Camden and Zone*, 11 U. C. R. 573; R. S. O. ch. 204, sec. 102, subsec. 19.

W. A. Foster, contra, referred to *Hodgins on Public School Law*, 1st ed., p. 190; *Ib.*, ch. 10, secs. 6, 7; R. S. O. ch. 204, sec. 194, subsecs. 11, 12; *School Trustees of Elzevir v. The Corporation of Elzevir*, 12 C. P. 548; *Trustees of the Roman Catholic School of Belleville v. The School Trustees of the Town of Belleville*, 10 U. C. R. 469; *In re the Strat-*

ford and Huron R. W. Co. and The Corporation of the County of Perth, 38 U. C. R. 112; *In re the Hamilton, &c., R. W. Co. and The Corporation of the County of Halton*, 39 U. C. R. 93.

October 19th, 1883. FERGUSON, J.—This is an application for a mandamus to compel the defendants to admit Jane Ann Dunn, a child of the plaintiff, into the public school in the town of Windsor, of which one James Duncan is the head master, and to duly register her and receive her as a pupil in the said school.

The evidence shews that apart from the Roman Catholic Separate School there are but two public schools in the town. One of these is the school mentioned, of which Duncan is the head master. It is called the Public Central School. The other is a coloured school. It is not a "separate school." During the last term the plaintiff's child was a pupil at the coloured school, and was registered as such under the provisions in that behalf contained in the school regulations, and I think it sufficiently appears that she attended the coloured school as a pupil till the termination of the last term.

At the commencement of the present term, on the morning of the 3rd day of September last, the plaintiff took his child to the Public Central School which he says is the school nearest to which she resides, and presented her to the teacher (Duncan) for admission to the school and registration as a pupil thereof. He says that the teacher Duncan refused to receive her as a pupil, and told him to make application to the school trustees for permission to have her admitted, and that he left after having instructed his child to remain in the school till expelled.

The plaintiff also says that he made application to the trustees at one of their regular meetings held on the 4th day of September last, and it was refused, and he seeks to make out that the real reason for not admitting his child to the school was that she is a coloured child.

The defendants on the other hand say that such was not

their reason at all, alleging as the reason that there was not accommodation at the school, and as a further reason that the application of the plaintiff was not made in the regular and proper way, under the provisions of the public school regulations.

The clause of the regulations relied upon by the defendants is ch. 10, sec. 6, which is in these words: "Every pupil, once admitted to school, and duly registered, shall attend at the commencement of each term, and continue in punctual attendance until its close, or until he is regularly withdrawn (by notice to the teachers to that effect); and no pupil violating this rule shall be entitled to continue in this school, or be admitted to any other, until such violation is certified by the parents or guardian to have been necessary and unavoidable, which shall be done personally or in writing."

The defendants also rely on section 7 of the same chapter, which is in these words: "Pupils in cities, towns, and villages shall be required to attend any particular school which may be designated for them by the inspector, with the consent of the trustees. And the inspector alone, under the same authority, shall have the power to make transfers of pupils from one school to another."

The defendants contend that the plaintiff should have complied with the requirements of those regulations, which the evidence shews have ever since they came into force been recognized and acted upon in the town of Windsor. It is beyond doubt, upon the evidence, that the plaintiff's child was a registered pupil at the coloured school during the last term. It is contended that she should have attended there at the commencement of the present term, and that the plaintiff desiring to have her transferred to the other school should have applied to the inspector for that purpose, and in this contention I am of the opinion that the defendants are right. I think the plaintiff should have complied with the regulations, and I think it is shewn that he did not do so. Counsel for the plaintiff relied upon sub-sec. 19 of section 102 of the School Act, R. S. O. c.

204, which says: it shall be the duty of the trustees of every rural school section "to permit all residents of the section between the ages of five and twenty-one years to attend the school so long as they conform to the general regulations and the rules of the school;" but in my opinion, this sub-section does not apply to the case. Then as to the question in regard to want of accommodation in the Public Central School. After having again perused all the affidavits, I am of the opinion that it has been shewn to be a fact that there was not accommodation. At first I had doubts on this subject, although the fact was deposed to by more witnesses than one, because I thought the witnesses might be giving their opinion only on the subject, and it was a matter on which opinions might well differ, and I asked from the defendants more definite information as to the actual facts and circumstances, and after having perused the additional affidavits, I think the defendants right in this contention.

The inspector says in his affidavit that he was always willing to entertain and consider any application of the plaintiff for the transfer of his child from one school to the other, and I think the plaintiff should have taken the course pointed out in the regulations. In any view of this branch of the case I apprehend the result must be the same, for after looking at the cases to which I have referred I think the want of accommodation at the Public Central School is a valid answer to the plaintiff's application especially when it appears, as I think it does, (though there is some confusion in the evidence owing to an alleged unauthorized removal of pupils from one room to another) that there was sufficient accommodation at the other school. I do not think it appears the plaintiff's child was refused admittance into the Public Central School on account of colour, nor do I think it proved that this was assigned by the teacher or by the trustees as the reason for such refusal, I think the application for the mandamus must be refused.

If costs are asked and insisted upon, I will hear what counsel may say on the subject.

A. H. F. L.

[CHANCERY DIVISION.]

ARMSTRONG V. FORSTER ET AL.

Insolvency—Bond of official assignee—Official assignee subsequently made creditors' assignee—Principal and surety—Insolvent Act of 1875—§8 Vic. ch. 16, D., secs. 28, 29.

Held, that where an official assignee in insolvency had given a bond as such with sureties, pursuant to the Insolvent Act of 1875, and amending Acts, and the creditors had duly appointed the same individual to be creditors' assignee, under section 29 of that Act, but had not required him to give security as such creditors' assignee, the sureties under the bond given by him as official assignee remained liable for his dealings with the estate, and were not discharged by reason of such appointment as creditors' assignee.

Seemle, that one who brings an action against an official assignee in insolvency for default in dealing with a certain estate, upon his bond given as security against such defaults, is not bound to ascertain if the assignee is in default as to other estates; and the sureties to the bond are discharged by payment to any one who recovers judgment against them.

THIS was a demurrer to a statement of defence in an action brought by one C. B. Armstrong, as assignee of the estate and effects of A. G. Duncan, an insolvent, under the Insolvent Act of 1875 and amending Acts, against George Forster and Francis Reynolds, as sureties to a bond given by one Haffner, an official assignee in insolvency.

The bond was as follows:

Know all men by these presents: that we, John Haffner, of, &c., hereinafter called the principal, George Forster, of, &c., and Francis Reynolds, of, &c., hereinafter called the sureties, are held and firmly bound unto our Sovereign Lady the Queen, her heirs and successors, in the sum of \$2,000 of lawful money of Canada, to be paid to our Sovereign Lady the Queen, her heirs and successors, for which payment well and faithfully to be made we bind ourselves and each of us, and the heirs, executors and administrators of each of us, and each of us jointly and severally, firmly by these presents sealed with our respective seals. Dated the 24th day of January, in the year of our Lord 1879.

Whereas the principal, having been appointed to the office or employment of an official assignee in and for the county of Wellington, in the Province of Ontario, is required by law to give security to the Crown for the due performance, fulfilment, and discharge of the duties appertaining thereto, and the sureties have consented to become his sureties for such his performance of the said duties.

And this bond is given in pursuance of an Act to further amend an Act respecting the security to be given by officers of Canada.

And whereas this bond is also given in pursuance of the Insolvent Act of 1876 to her Majesty, for her benefit and for the benefit of the creditors of any estate which may come into the possession of the principal under the last mentioned Act.

Now the condition of this obligation is such that if the principal faithfully discharges the duties of the said office and duly accounts for all moneys and property which may come into his custody by virtue of his said office, this obligation shall be void.

And also, that in case the principal, as such assignee, fails to pay over the moneys received by him, or to account for the estate or any part thereof, the amount for which the principal, as such assignee, may be in default may be recovered from the sureties by her Majesty, or by the creditors or subsequent assignee entitled to the same, by adopting in the said Province such proceedings as are required to recover from the sureties of a sheriff or other public officer.

Signed, sealed, and delivered	(Signed),	JOHN HAFNER.
in the presence of	(Signed),	G. FORSTER.
(Signed), EDWARD BURNS.	(Signed),	F. REYNOLDS,

The defendant Reynolds delivered the following statement of defence :

1. The defendant Reynolds denies that the said John Haffner received and now has the said moneys and assets of the said insolvent estate of the said A. G. Duncan under and by virtue of his office or appointment of official assignee for the county of Wellington, in the said Province of Ontario.

2. The said Reynolds says that he is advised and believes said Haffner, under and by virtue of his office as an official assignee for the county of Wellington, did, in or about the year 1881, seize upon and take possession of said insolvent estate, whereupon a meeting of the creditors of said estate was called, under the provisions of the Insolvent Act of 1875 and amending Acts, at which meeting the said creditors duly appointed said John Haffner as assignee of said estate, under the provisions of said Insolvent Act, but did not require any security to be furnished by him; and the said moneys and assets, and every part and parcel thereof, of said insolvent forthwith became vested in said John Haffner, as assignee of said estate as aforesaid; and if the said Haffner now has in his hands moneys or assets belonging to said insolvent estate which he neglects or refuses to hand over to the creditors thereof, or to whomsoever may be entitled thereto, it is as such assignee of said estate, duly appointed to said office by the creditors thereof as aforesaid, that he holds the same, and not as an official assignee in and for the county of Wellington.

3. The said Reynolds further says that he has no knowledge that said John Haffner has been duly removed from the office of assignee of said insolvent estate, and that the plaintiff has been duly appointed assignee thereof in his place and stead, and requires that said plaintiff shall be put to the strict proof thereof.

4. The defendant Reynolds further says that the said indenture mentioned in the first paragraph of the said plaintiff's statement of claim (being the bond in question) was not given, or intended to have been given, as security for the performance of his duties by said John Haffner, as the assignee of said estate, after his appointment to such office by the creditors thereof at the meeting duly called for that purpose as aforesaid, and after his duties as such official assignee had ceased and determined by reason of such appointment.

Delivered, &c.

The plaintiff demurred to this statement of defence, on the ground :

"That the indenture executed by the defendants, and set out in the plaintiff's statement of claim, was given and intended to be given as security for the performance of his duties as assignee of any and all estates which might come into the possession of said Haffner, under the Insolvent Act of 1875, until the final closing up or winding up of any and all such estates so coming into his hands. And on other grounds sufficient in law to sustain this demurrer."

The demurrer was argued on October 31st 1883, before Proudfoot, J.

Gibbons, for the demurrer. The question is, whether the security given by an official assignee in insolvency extends to moneys received by him as creditors' assignee. I refer to Insolvent Act of 1875, 38 Vic. ch. 16 (D.) sec. 28, 29; *Clarke's* Insolvent Acts, pp. 132-136. Without any appointment the assignee would, under section 29, have filled the same position; and the security should extend to all moneys received by him.

Jacob, contra. Section 2 of the Insolvent Act of 1875 shews the meaning of "assignee." The bond given only applies to the defaults of the official assignee: *Ib.*, section 45. See also, 40 Vic. ch. 41, secs. 8, 9.

Gibbons, in reply, referred to *The Trent and Frankford Road Co. v. Scott Marshall*, 10 C. P. 329.

Sinclair v. Baby, 2 P. R. 117, was also referred to.

November 2nd, 1883. PROUDFOOT, J.—This is an action brought against the sureties of Haffner, an official assignee in insolvency, and a creditors' assignee also, by a subsequent creditors' assignee, upon the bond given by Haffner, and the defendants as his sureties, under section 28 of the Insolvent Act of 1875.

That section provides that the official assignee, before acting as such, shall give security for the due fulfilment and discharge of his duties, in a specified sum, to be given to Her Majesty, for her benefit and for the benefit of the creditors of any estate which might come into his possession

under the Act. Upon default the sureties may be sued by her Majesty, or by the creditors or subsequent assignee entitled to the same, by proceedings such as are required to recover from the sureties of a sheriff or other public officer.

Haffner and the defendants signed the bond.

The defendants' defence is, that the creditors duly appointed Haffner assignee of the estate, but did not require him to give any security; and that any money received by him was received by him under the appointment of the creditors, and that he holds it as creditors' assignee and not as official assignee.

The plaintiff demurs.

The single question is, whether the sureties of an official assignee are liable for defaults committed by him as creditors' assignee.

The defence is simply a legal one, and relies upon no equities which might affect the defendants' liability and lead to a qualification of their legal position, the consideration of which was reserved by the late Chancellor in *Craig v. Milne*, 25 Gr. 259.

By the 29th section of the Act of 1875, the creditors may appoint an assignee, who is to give security to such an amount as may be fixed by the creditors. *In default of such appointment* the official assignee shall remain the assignee of the estate, and shall have and exercise all the powers vested by the Act in the assignee.

The defendants say there was no such default here, as the creditors appointed the official assignee to be their assignee.

I think it reasonably clear that, had this appointment by the creditors not been made, the sureties would have been liable for any dealings of the assignee with the estate. It was apparent on the statute that the official assignee, by such default of the creditors, might be called upon to administer the whole estate, and the bond was to cover the case of his failing to pay over money received by him, or to account for the estate. And the sureties must be taken to have contemplated such a contingency.

Does it make any difference that the creditors named him assignee without requiring security?

In *Oswald v. Mayor of Berwick-upon-Tweed*, 1 E. & B. 295; *S. C.* in appeal, 3 E. & B. 653, 5 H. L. 856, where one Murray had been appointed treasurer to the corporation while the office was an annual one, under 5 & 6 Wm. IV. ch. 76, sec. 58, and gave sureties for payment of all sums of money he might receive in virtue of his office, in consequence of his election to it, or under any annual or other election, and the 6 & 7 Vic. ch. 89, sec. 6, repealed that enactment, and directed that the treasurer should thenceforth hold his office during the pleasure of the council for the time being; it was held that there was not such a change in the tenure of the office, from an annual one to one during pleasure, as to discharge the sureties, and that such a change was covered by the words, *annual or other future election*.

Similar in principle are the cases of *Frank v. Edwards*, 8 Ex. 214, and *Skillett v. Fletcher*, L. R. 2 C. P. 469.

In the case before me, by the appointment by the creditors, no additional or increased risk was cast upon the surety beyond what he would have incurred without the appointment; and the cases referred to would seem to show that the surety's liability continued.

In *Corporation of the County of Ontario v. Paxton*, 27 C. P. 104, the provisional council of Ontario had appointed Paxton their treasurer, and his duties in that capacity were of a very limited character: when the county was established as a separate organization, the council repealed the by-law of the provisional council appointing Mr. Paxton, and thereby removed him from office, and then they appointed him treasurer of Ontario, imposing upon him much more onerous and different duties. It was held the sureties were discharged.

To the same effect is *The Guardians of the Malling Union v. Graham*, L. R. 5 C. P. 201.

These last two cases, therefore, have no application to the present.

It was not suggested that, the bond being given as security for the dealings of the official assignee with all the estates that came under his management, the plaintiff would be bound to ascertain if the assignee was in default as to other estates; nor does it seem to me that any such duty was cast upon him, though the question occurred to me. I do not think that was the sort of matter referred to by the Chancellor in *Craig v. Milne*, 25 Gr. 259: and the proceedings being such as are required to recover from sheriffs' sureties, the sureties are discharged by payment to any one who recovers judgment against them.

The official assignee, in case of no appointment by the creditors, has all the powers of the creditors' assignee, and is liable to be removed by the creditors. He did not owe a divided duty, nor was he subject to another control. The appointment by the creditors made no change in these respects; and, as in *Oswald v. Mayor of Berwick-upon-Tweed*, *supra*, it must have been in the contemplation of the sureties that he might have the whole administration of the estate; and it does not matter whether he performed that duty under the one or the other appointment.

The demurrer is allowed, with costs.

A. H. F. L.

[CHANCERY DIVISION.]

MCKAY ET AL. V. HOWARD.

Statutory Short Form Mortgage—Written and printed provisions—Earlier and later provisions—Construction—Moneys paid under protest— R. S. O. ch. 104.

M. gave a mortgage to T. on certain lands. The mortgage was in the statutory short form, except that immediately after the printed covenant for payment the following words were inserted in writing: "It being understood, however, that the said lands only shall in any event be liable for the payment of the mortgage." The distress clause remained unaltered in its usual place, viz., after the covenants. T. assigned the mortgage to H., who, on an instalment of interest falling due, distrained for it. M. now brought this action for a wrongful distress.

Held, that M. was entitled to recover the amount distrained for with interest and costs, for the earlier provision controlled the subsequent one, both because it was first in the deed, and because it was in writing, and the words superadded in writing were entitled to have greater effect attributed to them than the printed clauses.

Green v. Duckett, L. R. 11 Q. B. D. 275, followed, as the right to recover moneys paid under protest.

THIS was an action for wrongful distress, under the following circumstances. A mortgage was made by the plaintiffs to one Taylor, to secure \$3,600, and interest. It was in the Statutory Short Form, see R. S. O. c. 104, sched. A and B, except that immediately after the printed covenant for payment, the following words were inserted in writing "It being understood, however, that the said lands only shall in any event be liable for the payment of the mortgage." The mortgage contained all the statutory covenants and provisions, filled in in the usual way except as above mentioned, and the distress clause was printed in its usual place, viz. after the covenants. The defendant to whom this mortgage was assigned, when an instalment of interest fell due distrained for it. Plaintiffs to prevent their goods being taken away, paid the interest to the bailiff, under protest, and then brought this action to recover damages for wrongful distress.

The action was tried at the sittings of this Court at St. Catharines, before Boyd, C., on October 15th, 1883.

W. Cassels, Q.C., and R. Gregory Cox, for the plaintiffs. On the true construction of the mortgage the words written after the covenant for payment control the subsequent and printed proviso as to distress, and therefore there was no power of distress; *Clark v. Woodruff*, 83 N. Y., 518. At any rate, even if there is a right of distress, it cannot be had without giving some reasonable notice: *Trust and Loan Co. v. Lawrason*, 6 A. R. 286; *Clewes v. Hughes*, L. R. 5 Ex. 160; *Moore v. Shelley*, 48 L. T. N. S. 918; *Kearsley v. Philips*, 31 W. R. 909.

John McKeown, for the defendant. The mortgage gives a power of distraining. Moreover by payment to the bailiff the plaintiffs lost their right of action.

November 21st, 1883. *BOYD, C.*—The mortgage in this case is in the usual printed statutory short form, with certain written additions. There is the distress clause printed, but there is a prior written clause providing that the mortgagee shall look to the land alone for payment. These are inconsistent and contradictory provisions, so that the question arises which shall prevail. For two reasons the earlier controls both, because it is first in the deed, and because it is in writing. The principle of construction is thus laid down by Lord Ellenborough in *Robertson v. French*, 4 East at p. 136: "If there should be any reasonable doubt upon the sense and meaning of the whole, the words superadded in writing are entitled to have a greater effect attributed to them than to the printed words, inasmuch as the written words are the immediate language and terms selected by the parties themselves for the expression of their meaning, and the printed words are a general formula adapted equally to their case, and that of all other contracting parties upon similar occasions and subjects." Following in the same line, are the opinions expressed in *Gumm v. Tyrie*, 4 B. & S. at p. 713, in which Blackburn, J., is thus reported: "I agree with my brother Crompton, that where there are formal and general words which are the usual terms of a contract, and there are

other special and peculiar words, and the question is, which are to have most weight, the terms which a man has thought of for himself and written into the contract, if they conflict and cannot be reconciled with the printed words, ought to have most weight."

The same rule of construction obtains in American Courts: *Clark v. Woodruff*, 83 N.Y. 518; and it indeed forms one of the articles (sec. 816) of the New York Civil Code of 1865, which gives the reason of the rule thus: 'That the parts which are purely original control those which are copied from a form; the printing being ordinarily some evidence that the contract was to that extent formal.'

Again, the rule of law is, that in the construction of deeds where several parts are irreconcilable, the first shall prevail, the reverse being the rule as to wills, where the last governs. The reason of this as given in *Burton* on Real Prop. 8th ed. p. 173, sec. 512, is that as deeds are made after due deliberation, that which is principally intended by the parties may be expected to occur in the first place. Whereas in a will, the last words are considered to express the latest intention of the testator: *Hayes & Jarman's Forms of Will*, 4th ed., p. 439 n. This rule was acted on in a mortgage case, *Bennett v. Foreman*, 15 Gr. 117.

The objection raised that the interest having been paid, though under protest, there is no right to recover it back, is answered by the recent case of *Green v. Duckett*, L.R. 11 Q. B. D. 275.

The result is, that judgment should go in the plaintiffs' favour for a return of the amount levied by distress and paid under protest, with interest and costs. Apart from the technical trespass the plaintiffs have sustained no substantial damages, and I therefore award none.

A. H. F. L.

[CHANCERY DIVISION.]

MCGARVEY V. THE CORPORATION OF THE TOWN OF
STRATHROY.

Disobeying injunction—Appeal—Stay of proceedings—Court of Appeal Act—Practice—R. S. O. ch. 38, secs. 26, 27.

Where an injunction is ordered at the hearing of a cause, and the parties enjoined give the security required by R. S. O. ch. 38, sec. 26, pending an appeal to the Court of Appeal, all proceedings to enforce the injunction are by virtue of sec. 27 of that Act thereupon stayed; and a writ of sequestration cannot therefore be obtained, pending the appeal, on the ground of non-compliance with the injunction.

Dundas v. Hamilton and Milton Road Co., 19 Gr. 455 followed, and preferred to *McLaren v. Caldwell*, 29 Gr. 438.

IN this case an injunction was granted at the hearing of the cause, restraining the defendants from causing more water to flow on the plaintiff's property than would naturally have flowed on it.

The plaintiff now moved for a writ of sequestration against the defendants for disobeying the injunction.

The motion was made on October 6th, 1883, before Proudfoot, J.

Folingsbee, for the motion.

Cattanach, for the defendants. The defendants have appealed from the judgment to the Court of Appeal, and have perfected their security; and under sec. 27 of the Court of Appeal Act, R. S. O. ch. 38, all proceedings in the suit are thereby stayed: *Dundas v. Hamilton and Milton Road Co.*, 19 Gr. 455; *McLaren v. Caldwell*, 29 Gr. 438, though apparently an authority against this contention is not really so, because it was not necessary, in that case to decide whether the perfecting of the security *ipso facto*, creates a stay of proceedings.

November 21th, 1883. PROUDFOOT, J.—In this case an injunction was granted at the hearing of the cause restraining the defendants from causing more water to flow on the plaintiff's property than would naturally have flowed on it.

This is a motion for a sequestration for breach of the injunction.

The defendants have appealed the case to the Court of Appeal, and have given the security required by the statute R. S. O. ch. 38, sec. 26, and they claim that under section 27, proceedings to enforce the injunction are stayed upon the perfecting of the security, as this decree is not among any of the exceptions to that section.

The subject was considered by the late Chancellor in *Dundas v. Hamilton and Milton Road Co.*, 19 Gr. 455. where security had been given to prosecute an appeal to the Privy Council under sec. 50, which by sec. 51, was to operate as a stay of execution, and sec. 52 made the same exception to such a stay as sec. 27. The Chancellor says: "It is evident that in our Court of Appeal Act, the word execution is applied in the same sense to decrees of this Court. The exceptions enumerated in section 16 (27) shew this conclusively. I do not see how I can hold that process by which a decree is enforced which directs the removal of a bridge is less an 'execution' than the like process to enforce a decree directing the assignment or delivery of documents or personal property; or a decree directing the execution of a conveyance or other instrument; or a decree directing the sale or delivery of real property or chattels real. It may be that it would have been well to have added to the list of exceptions the case of injunctions mandatory or otherwise."

A similar question came before my brother Ferguson, in *McLaren v. Caldwell*, 29 Gr. 438, where he refused a motion to stay proceedings upon an injunction on the ground that this section (27) of the Act does not apply to injunctions, whether issued before or after decree. The motion was properly refused as the stay of proceedings given by the Act would not be a ground for a substantive application; but would be a good answer to an application for an attachment or sequestration. See *Dundas v. Hamilton and Milton Road Co.*, 19 Gr. at p. 456. This case seems to have met with the approval of Burton, J., upon appeal,

6 App. 456, 494. But the matter was not argued, and no judgment was in fact passed upon it. The other Judges in Appeal take no notice of it.

Between these two contradictory decisions I am left to decide for myself, and I think that the decision in *Dundas v. Hamilton and Milton Road Co.*, was the true construction upon the Act, and that the perfecting the security in this case operates as a stay of proceedings to enforce the injunction.

I therefore refuse the motion, but on account of these differing decisions, it is refused, without costs.

A. H. F. L.

NOTE.—This case has been carried to Appeal.

[CHANCERY DIVISION.]

DUNLAP V. DUNLAP.

Conveyancing—Deed—Habendum—Vesting—Resulting use—Mistake—Non-professional conveyancers.

T. and his son D. desired to effect a certain settlement of landed property, but employed a non-professional conveyancer to draw the deed of settlement, who failed to provide for many of the essential provisions of the agreement, and as to the land made T. in consideration of natural love and affection, grant the same to D., his heirs and assigns, *habendum* "after the decease of T. unto and to the only proper use and behoof of D., his heirs and assigns for ever;" and D. now brought this action for waste against T.

Held, that the deed was not void as passing only a freehold to commence in *futuro*, for the *habendum* is not essential to a deed, and the granting part was sufficient of itself to pass the immediate freehold to D., the expressed consideration of natural love and affection sufficing to carry the use to D., in whom the deed, viewed as a covenant to stand seised, would vest the entire estate.

But *quære*, whether the express limitation of the use in the *habendum* after T.'s death would not rebut the implication of an immediate vesting of the use at the date of the deed in D., so that the use of so much of the estate as was not expressly limited, viz. for the life of T., resulted to and vested in T.

Held, however, on the evidence, that the deed did not express the true agreement of the parties, and could not be allowed to stand; but D. having acted on the faith of the arrangement for some years, and being willing to carry out the original bargain, and execute proper instruments, the deed should not be set aside, but should be reformed.

The danger of employing unlearned conveyancers commented on, and the expediency of throwing safeguards round the practice of conveyancing pointed out.

THIS was an action for damages for alleged waste, and for an injunction to restrain the continuance thereof, wherein one David Dunlap was plaintiff, and Thomas Dunlap the younger, and Thomas Dunlap the elder defendants.

The plaintiff alleged that he was the owner of the land on which the alleged waste had been committed, subject to the life estate therein of Thomas Dunlap, the elder, his father, and the father of Thomas Dunlap the younger. The deed on which the plaintiff relied was prepared by an unprofessional conveyancer, and was as follows:

This indenture, made the 6th day of August, A. D. 1878, between Thomas Dunlap, senior, of &c., of the one part, and David Dunlap, youngest son and heir apparent of the said Thomas Dunlap, senior, of the other part, witnesseth that the said Thomas Dunlap, senior, as well for and in consideration of the natural love and affection which he hath and beareth unto the said David Dunlap, as also for the maintenance, support, livelihood, and preferment of him, the said David Dunlap, hath given, granted, aliened, enfeoffed, and confirmed, and by these presents,

doth give, grant, alien, enfeoff and confirm unto the said David Dunlap, his heirs and assigns, all that parcel or tract of land containing one hundred acres, known and described as follows, being the west half of lot 3, in the 8th concession of North Monaghan, in the County of Peterborough, together with all and singular houses, outhouses, edifices, buildings, barns, stables, courts, curtilages, gardens, orchards, woods, underwoods, ways, waters, watercourses, advantages and appurtenances, whatsoever to the said parcel or tract of land and premises belonging, or in any wise appertaining, and the reversion and reversions, remainder and remainders, rents, issues, and profits of the same, and all the estate, right, title, interest, property, claim, and demand, whatsoever of him the said Thomas Dunlap, senior, of, in, and to the said parcel or tract of land and premises, and of, in, and to every part and parcel thereof, with their and every of their appurtenances, and all deeds, evidences, and writings concerning the said premises. And the said Thomas Dunlap, senior, binds the said David Dunlap, his heir, to pay the following shares within six years after the decease of the said Thomas Dunlap, senior. First, Jane Withercutt to be paid one hundred dollars, and also a cow to be given her. Second, Sarah Magee to be paid one hundred dollars, and also the bed of the said Thomas Dunlap, senior, to be given her. Third, Elizabeth Hooye to be paid one hundred dollars. To have and to hold the said parcel and tract after the decease of the said Thomas Dunlap, senior, together with all the personal estate or effects belonging to or used on said farm, and all and singular other the premises hereby granted and confirmed unto and to the only proper use and behoof of the said David Dunlap, his heirs and assigns for ever.

In witness whereof the said parties to these presents have hereunto set their hands and affixed their seals the eighth day of August, one thousand eight hundred and seventy-eight.

Signed, sealed and delivered
in presence of
ROBERT THOMPSON,
WILLIAM DOUGLASS,

} THOMAS DUNLAP. [Seal.]
DAVID DUNLAP. [Seal.]

The rest of the facts of the case sufficiently appear in the judgment.

The trial of the action was commenced at the sittings of this Court at Peterborough on April 7th, 1883, before Boyd, C., when the evidence was taken, and the case adjourned with a view to a settlement being arrived at between the parties, and this not being effected, the case was subsequently argued at Toronto.

Edwards, for the plaintiff. There has been no actual fraud here; it is a matter of improvidence at the most: *Wycott v. Hartman*, 14 Gr. 219; *Armstrong v. Armstrong*, *ib.* 528. The father did not convey everything to the son; he reserved a life interest in the land, and this was enough to support him for life.

G. T. Blackstock and *W. H. Moore*, for the defendants. This is merely an action of waste. The deed, on its face, is void, as being one to take effect *in futuro*. Moreover, we set up that it was obtained by improper influence from the father. See *Mason v. Seney*, 11 Gr. 447; *Lavin v. Lavin*, 27 Gr. 567.

June 20th, 1883. BOYD, C.—I was in hopes that the parties would have had the good sense to settle this family dispute, but failing this, I have now to dispose of the case as I best can with a view to end the strife. The action is for waste, the plaintiff alleging that he is the owner of the land, subject to the life estate therein of the defendant, his father. The waste consists in felling some trees on the land by another defendant, the brother of the plaintiff who was put in motion by his co-defendant. The defence sets up that the deed on which the plaintiff relies was obtained by him from his father by means of fraud, deceit, and undue influence, and it asks that the deed may be cancelled as fraudulent and void.

Upon the evidence I come to the conclusion that no fraud or improper influence was used; but that the whole difficulty arose from the blundering of a conveyancer, unlearned in the law, who appears from his evidence to have pieced together the incongruous instrument in question, out of a *cento* of random extracts taken from some book of forms. The agreement which the father and son sought to have embodied in writing was substantially this: the father desired the son to remain with him on the place, and agreed if he did so that the farm should be his at the father's death; the father was to be the proprietor, and have authority over the place while he lived; the son was to work the land, and provide suitable maintenance thereon for the father, and besides pay him \$45 a year for life, and was also to pay certain legacies to his sisters six years after the father's death.

The document which was executed by the parties does not provide for many of these essential provisions. All

mention is omitted of the yearly payments: reference is made in the recitals, not to the father's, but to the son's maintenance, and so far as relates to the land it is rather puzzling to ascertain what is the precise operation of the conveyance. It is expressed to be made to the youngest son, and heir apparent of the grantor, and in consideration of natural love and affection, grants the land to the son, his heirs and assigns. The *habendum* runs thus: "To have and to hold the said tract of land after the decease of the said Thomas Dunlap, senior (father), unto and to the only proper use and behoof of the said Daniel Dunlap (senior), his heirs and assigns for ever. This deed is not void on the ground urged that it passes only a freehold to commence *in futuro*.

The *habendum* is not essential to a deed, and there is none in the forms given in the statute respecting short forms of deeds and mortgages, as pointed out by Proudfoot, V.C., in *Seaton v. Lunney*, 27 Gr. at p. 175. The granting part of this deed though not expressed to be made in pursuance of the Act respecting short forms, is sufficient of itself to pass the immediate freehold in fee simple to the grantee. If no consideration had appeared, and there had been no *habendum* it may be that the use would have resulted as at Common Law to the party conveying, as pointed out in *Williams on Real Property*, 14th ed., p. 197. But the consideration of blood relationship here expressed is sufficient to carry the use to the son, and the deed viewed as a covenant to stand seized would vest the entire estate in the son: *Seaton v. Lunney*, at p. 176, and *Sunder's Uses*, 4th ed., vol. ii., p. 80.

Now the *habendum* does not necessarily derogate from this. Standing alone, if there had been no estate mentioned in the premises of the deed, the *habendum* would operate as a covenant to stand seized after the death of the grantor. *Doe dem. Wilkinson v. Tranmer*, 2 Wils. 75. But that is of course superfluous if the whole estate has passed by the granting part. According to a line of reasoning adopted in *Goodtitle v. Gibbs*, 5 B. & C. 709, the express limitation of

the use in the *habendum* after the grantor's death would rebut the implication of an immediate vesting of the use at the date of the deed in the grantee, and then the use of so much of the estate as was not expressly limited (*i. e.* in this case for the life of the grantor), would result to and vest in the father, which would substantially carry out the intent of the parties, save that it should be plainly expressed, that the father is to enjoy for his life, without impeachment of waste, which was contemplated by him: *White v. Briggs*, 15 Sim. 17.

Apart from this uncertainty of construction, the deed does not express the true agreement and does not protect the father as fully as should be. As set forth in the deed the transaction might fairly be called improvident and could not be allowed to stand. But it would be most unjust to the son, who, on the faith of the arrangement has acted for some years and has changed his position in life to set it aside, if he will carry out the original bargain. That was for both parties interested a reasonable and by no means unusual arrangement by which the son was to stay at home, work the farm, and keep the father, in view of being ultimately the owner; while the father in return was bound to secure the property to the son when he, the father, died. The plaintiff is willing that the true agreement should be carried out by the execution of proper instruments. Upon this concession, and upon his paying the arrears of the annuity, and the arrears (if any) of maintenance, (these to be placed on a money basis), I do not think the defendant, the father, should be allowed to set aside the deed which secures the ownership of the land to the son after the father's death: *Cameron v. Sutherland*, 17 Gr. 286. If the parties cannot agree upon the form and terms of the writings and the amount of the payments, it will be referred to the Master at Peterborough to settle the dispute. The documents should be prepared and submitted to the father at the son's expense. If they go before the Master he will dispose of the subsequent costs. I give no other costs and give no judgment on the plain-

tiff's claim. By the terms of the real agreement he cannot proceed against the defendants for such waste as is complained of here and so is in the wrong. But the defendants are also in the wrong, for they charge matters of fraud and deceit and other misconduct which I find to be unfounded in fact. If the plaintiff does not agree to and carry out the above terms then I set aside his conveyance and dismiss the action with costs.

This litigation affords another example of the mischief that arises from the employment of unlearned persons in that branch of the law, which, of all others, is most abstruse and technical. It is unsafe to entrust the preparation of instruments affecting real property to unskilled and unprofessional hands, and one cannot doubt that much bitter contention and many of the disastrous results of family litigation would be avoided if the law in this Province threw safeguards around the practice of conveying in some such way as is found efficacious in the Province of Manitoba. (a)

A. H. F. L.

(a) Reversed on Appeal, 20 C. L. J. 262.

[CHANCERY DIVISION.]

ONTARIO BANK V. LAMONT ET AL.

Assignment in trust for creditors—Impeaching the same on the ground of previous preferential conveyances—Fraudulent preference—Discretion of assignee as to sale—Transfer subject to payments to mortgagees—Power to carry on business of assignor—3 Eliz. ch. 5—R. S. O. ch. 118.

Where it was sought to set aside a certain assignment of real and personal property made by an insolvent debtor to a trustee for creditors, on the ground that the assignee had, before the execution of it satisfied some of his creditors in full by transferring goods of his to them in a manner alleged to be preferential, but the instrument impeached did not require the creditors to submit to any conditions, and did not provide for a release of the debtor in any manner.

Held, that the instrument was valid, and could not be set aside, and the case was distinguishable from those American cases which embody the principle that a debtor shall not be allowed to dispose preferentially of part of his estate, and as part of the same scheme to turn over the remainder of it to trustees for creditors by an instrument which provides for his discharge.

The duties of an assignee under such an instrument as the one in question in this case are analogous to those of executors and trustees administering estates, and the Court will consider that a year is a proper time within which the sale of the property assigned is to be made, where the assignment leaves the time and manner of such sale in the discretion of the assignee. If the sale be not made within a year the *onus* will be cast on the assignee of satisfying the Court of his *bona fides* in seeking further delay.

Semble, that where in such an instrument the goods are transferred subject to the payment of rent to a prior mortgagee this does not invalidate the instrument.

Where such an instrument provides for the carrying on of the business of the insolvent debtor by the assignee, but only as subsidiary to the winding up of the same, this is not unreasonable, and does not invalidate the assignment.

THIS was an action brought by the Ontario Bank against Allan Lamont, Thomas Swan, John McLaren, Charles W. Cheesman Lawrence, H. Yeomans, David Davidson, and John Rogers, for the purpose of having a certain conveyance declared fraudulent and void as against them under the provisions of 13 Eliz., ch. 5, and R. S. O., ch. 118.

By their statement of claim the plaintiffs set out that on March 22nd, 1883, they recovered a judgment against the defendant Swan for \$4,439.73, and on March 31st following issued and placed in the sheriff's hands writs of *fi. fa.* against the goods and lands of the said defendant Swan to recover the amount of the said judgment, and the said writs were then in the sheriff's hands, entirely unsatisfied and in full force and effect. That prior to March 12th, 1883, the said defendant Swan was the absolute owner, subject to certain mortgage incumbrances thereon of cer-

tain lands therein set forth, and also the owner of certain goods and chattels, all situated in or about the said premises, and that on the said last-mentioned date, and under and by virtue of a certain indenture, bearing date on that day, and set out at length below, the said defendant Swan did convey, or pretend to convey to the defendant Lamont the said lands and goods and chattels for the alleged benefit of creditors of the said Swan generally, for the alleged consideration, and upon the trusts set out in the said indenture: that Jessie Swan, wife of the defendant Swan, did not execute the said indenture: that on the said last-mentioned date the said defendant Swan was largely indebted to the plaintiffs and to numerous other persons in various large amounts, and was unable to pay his debts in full, and the plaintiffs had very shortly before, nameiy on March 9th, 1883, caused the said defendant Swan to be served with a writ of summons in the action in which they subsequently obtained their said judgment, and certain notes and acceptances held by the plaintiffs against the said defendant, amounting altogether to a large amount, were shortly about to mature, and they, the plaintiffs, charged that the said conveyance was made by Swan voluntarily and without any adequate consideration, and with the fraudulent intent to defeat and hinder them in the collection of their claim in the said action, with which intent it was also accepted by the defendant Lamont: and that it was fraudulent and void as against them, under the provisions of 13 Eliz., ch. 5, and R. S. O. ch. 118, and that it should be set aside, and the interest of the defendant Swan in the said goods and chattels, and in the said lands made available for the payment of the plaintiffs' judgment: and the plaintiffs claimed that the conveyance might be declared fraudulent and void as against them under the said statutes and otherwise, and might be set aside, and that the interest of the defendant Swan in the goods and chattels and lands might be made available for the payment of their judgment, and the defendants, some or one of them, might be

ordered to pay the costs of this action and for general relief.

The Indenture in question was as follows:

This Indenture made (in triplicate) this 12th day of March, 1883, in pursuance of the act respecting short forms of conveyances, between Thomas Swan, of the Town of Mount Forest, in the County of Wellington, manufacturer, of the first part, and

Allan Lamont, of the same place, hardware merchant, of the second part, and all the other creditors of the party of the first part of the third part, and Jessie Swan, wife of the first part of the fourth part.

Whereas, the said party of the first part is justly and truly indebted to the several persons and parties hereto of the second and third parts in sundry considerable sums of money, and has become unable to pay and discharge the same with punctuality or in full, and he the said party of the first part is now desirous of making a fair and equitable distribution of his property and effects among his creditors for the purpose of paying and satisfying ratably and proportionately, and without preference and priority, all of the creditors of the said party of the first part their just debts.

Now this indenture witnesseth that the said party of the first part in consideration of the premises and of the sum of \$1 of lawful money of Canada, now paid by the said party of the second part to the said party of the first part (the receipt whereof is hereby acknowledged) he the said party of the first part doth grant, bargain, sell, convey, and assign unto the said party of the second part, his heirs, executors, administrators and assigns forever, all and singular [the lands in question] together with all and singular the personal estate, effects, goods, chattels, household furniture, stock in trade, sum and sums of money, bills, drafts, books of account of whatever nature and kind soever of the party of the first part (excepting thereout and therefrom the exemptions allowed by law) and more particularly enumerated and described in the schedule hereto annexed and marked schedule "A," and in trust nevertheless to and for the following uses, purposes and intents, that is to say: that the said party of the second part shall forthwith as soon as conveniently may be, receive and get in all credits, sums of money due or owing to the party of the first part, and do also sell, convey, and convert into money all such and so much of the personal estate and effects as shall not be necessary to be kept for the purpose of enabling the party of the second part, his executors or administrators to carry on the business which the party of the first part has hitherto carried on in winding it up to the best advantage, and also to have and to hold the lands and tenements hereby assigned and conveyed in trust to sell the same as the said party of the second part, his executors or administrators in his or their discretion shall think best, and either together or in parcels, and either by public auction or private contract, and on such terms and in such manner as he or they shall think fit, and on such sale to convey the same by good and sufficient conveyance to the purchaser or purchasers thereof, and by and with the proceeds of such sales and collections the said party of the second part shall first pay and discharge all the just and reasonable expenses, costs, charges of executing and carrying into effect this assignment, and all rents, taxes and assessments due or to become due upon the lands tenements and hereditaments aforesaid until the same shall be sold and disposed of. 2nd. To retain a reasonable compensation based upon the care and trouble bestowed in and about the trusts; and 3rd, by and with the residue or net proceeds and

avails of such sales and collections the said party of the second part shall pay and satisfy ratably and proportionately and without preference and priority all the creditors of the said party of the first part their just debts according to the amount of their respective claims; and 4th, in the event of there being any of the said estate or effects of the party of the first part remaining in the hands or possession of the party of the second part after the satisfying in full of all the claims of the creditors of the party of the first part then also to return any surplus of the said proceeds and avails, if any there be, to the said party of the first part, his executors, administrators, or assigns.

And it is hereby expressly declared and agreed that the said party of the second part shall not be authorized to carry on the said business except so far as may be necessary in the interest of the said creditors in winding up the estate.

And the said party of the fourth part hereby bars her dower in the said lands.

In witness whereof the said parties hereto have hereunto set their hands and seals.

Signed, sealed and delivered
in the presence of

S. MASSON.

THOS. SWAN.
ALLAN LAMONT.
CHARLES W. CHURMAN.
LAWRENCE H. YEOMANS.
D. DAVIDSON.
JOHN ROGERS.
JNO. McLAREN.

{ Seal. }

By a joint statement of defence the defendants admitted the execution of the conveyance in question, but denied all allegations of fraud, and fraudulent intention charged in the plaintiff's statement of claim, and said that the same was made and executed by the defendant, Swan under pressure from the other defendants, and his other creditors and *bonâ fide*, and with the express purpose of paying and satisfying ratably and proportionably, and without preference or priority, all his creditors their just debts, and set up sundry other defences. not material to mention here.

The remaining facts of the case, and the arguments of Counsel, sufficiently appear in the judgment.

The trial was commenced at the sittings of the Court at Toronto, on June 26th, 1883, and certain witnesses were examined, when it stood over till September 24th, 1883, on which day the remainder of the evidence was taken, and the case argued.

J. Bethune, Q.C., for the plaintiffs cited the following authorities: *Burrill* on Assignments, 4th ed., p. 174, sec. 128; *Bump* on Fraudulent Conveyances, 3rd ed., p. 364-5; *Berry v. Cutts*, 42 Me. 445; *Spaulding v. Strong*, 36 Barb. 310; *McAllister v. Marshall*, 6 Binn. 338; *Van Patten and Marks v. Burr et al.*, 52 Iowa, 518; *Burrows et al. v. Lehndorff*, 8 Iowa, 96; *Mower et al. v. Hanford et al.*, 6 Minn. 535; *Hubbard v. Russell et al.*, 24 Barb. 405; *Watts v. Howell et al.*, 21 U. C. R. 255.

S. H. Blake, Q.C., *J. B. Clarke*, and *Stone*, for the defendants, cited *Bump* on Fraudulent Conveyances, 3rd ed. p. 363, 394-5, 397; *Maulson et al. v. Peck et al.*, 18, U. C. R. 121; *Jones v. Whitbread et al.*, 11 C. B. 406; *Bolder et al. v. London and Westminster Discount Co.*, L. R. 5 Ex. D. 46; *Cunningham v. Freeborn*, 11 Wend. 257; *O'Brien et al. v. Clarkson*, 20. R. 525; *Gallagher v. Glass*, 32 C. P. 641.

September 29th, 1883. BOYD, C.—The assignment impeached does not require the creditors to submit to any conditions, and does not provide for a release of the debtor in any manner. This being so, the American cases cited by Mr. Bethune have, in principle, no application, and it would be highly unreasonable to avoid the instrument because the debtor before the execution of it satisfied some of the creditors in full by transferring his goods to them in a manner alleged to be preferential. If that be so, the transactions can be attacked in detail by any dissatisfied creditor, and he will not be hampered in pursuing the proper remedy by any of the provisions of this instrument. So far as I can discover the principle of the American cases cited (most of which depend upon the special provisions of local statutes), it is this: A debtor shall not be allowed to dispose preferentially of part of his estate, and as a part of the same scheme to turn over the remainder of it to trustees for creditors by an instrument which provides for his discharge. That is to say, he cannot be allowed to coerce his creditors into an acceptance of the fragments of his estate as a satisfaction in full of their claims, while he

has disposed of other parts of his property to pay preferred creditors in full.

These considerations have no application to the present case, the only effect of the deed being to vest the estate in the hands of a trustee for equal distribution, so that the whole may not be swept off upon a forced sale at the instance of an execution creditor. Unless some such special provision existed in the deed of assignment for the benefit of creditors, I should deem it contrary to all proper practice, and to the uniform course of the Court to give relief to an execution creditor as against an assignment good on its face, merely because the debtor had acted fraudulently as to other property not in question upon the pleadings, and not embraced in the impeached instrument. See *Wight v. Moody*, 6 C. P. 505."

It was argued besides that the assignment was invalid on its face. One ground taken was that the chattels were transferred expressly subject to the payment of rent under the prior mortgage to the Union Loan and Savings Company. I have read the instruments, and do not find that is so in fact. No such language appears. If it did, I should not regard the objection as fatal, but only a mere expression of that which was inevitable under the circumstances of the case.

It was further argued that it was left in the discretion of the assignee as to selling. That is the case in terms as regards the realty, not as to the personalty. It is not to be forgotten that there is no power under the assignment enabling the trustee to impose unreasonable terms on the creditors in the way of assenting to a discharge or commuting their claims. The duties of assignees under their instruments are analogous to those of executors and trustees administering estates, and the Court will consider that a year is a proper time within which the sale is to be made. If not made within that time the onus will be cast on the assignee of satisfying the Court of his *bona fides* in seeking further delay. Execution creditors cannot sell the land for a year, and a delay of that time cannot be said to

prejudice them or render the assignment on that ground impeachable under the Statute of Elizabeth.

The law will impute to the words used in this assignment the meaning that the trustees shall sell within a reasonable time, and that depends on the circumstances of the case, which may require more or less than a year, according as the business can be satisfactorily wound up and disposed of: *Sculthorpe v. Tipper*, L. R. 13 Eq. 240; *Goodeve v. Manners*, 5 Gr. 114; *Quebec Bank v. Snure*, 16 Gr. 681.

It was further objected that the clause for carrying on the business was unreasonable and invalidated the assignment. But clearly this cannot succeed when the terms of the trust are regarded. It is to sell forthwith the personal estate except such parts as are necessary to be kept for the purpose of enabling the trustee to wind up the business to the best advantage; and at the end of the deed there is this clause that the trustee shall not be authorized to carry on the said business except so far as may be necessary in the interest of the creditors in winding up the estate. The language of Jervis, C. J., in *Janes v. Whitbread et al.*, 11 C. B. 406, is precisely in point, and to this effect: "The deed contemplates the sale of the property and the winding up of all business; and the power given to the trustees to carry on the trade was evidently intended to be merely subsidiary to the winding up of the concern." *Bank of Toronto v. Eccles*, 2 E. & A. 68, and *Maulson et al. v. Peck et al.*, 18 U. C. R. 113; *Metcalfe v. Keefer*, 8 Gr. 392.

I find nothing invalid in the deed itself and, I find no extrinsic circumstances which bring it within the mischief of 13 Eliz., or the Act respecting the fraudulent preference of creditors. R. S. Ont. ch. 118.

There remains therefore but to dismiss the action, with costs.

A. H. F. L.

[CHANCERY DIVISION.]

GRAHAM V. ROSS.

Mortgage—Covenant to build house, fence and clear—Forfeiture of extended terms of payment—Relief against forfeiture—Costs in discretion of the Court—O. J. A., rule 428.

The defendant gave a mortgage to the plaintiff in which he covenanted to pay the mortgage money in nine equal annual instalments, and also to clear up and fence ten acres in each year for five years from the date of the mortgage, and to build a log house on the land within one year, and there was a proviso that the mortgage should immediately become due and payable "after default being made in building the house, and clearing the land at the periods of time above mentioned." No default occurred in payment of the mortgage money, but the log house was not built until about a month after the expiry of the first year, nor were ten acres fenced, though more than ten were cleared.

Held, that the plaintiff was entitled to insist on a forfeiture of the extended terms of payment in consequence of the breach of covenant as to the erection of the house, and to judgment for redemption or foreclosure, but should have no costs. Relief is given against forfeitures for non-payment of rent, and in certain cases for neglecting to insure, but no case appears in which default like the present has been relieved against.

Seemle, that if the only default had been the not putting up of the fence, the forfeiture would have been relieved against, for the clearing of the land was the substantial part of that covenant.

Seemle, also, that in this province equity will not relieve against a proviso in a mortgage that on default of payment of a part of the debt, the whole shall become due.

THIS was an action brought by James Graham, and by order of revivor, James Alexander Graham, and Margaret Wellesley Graham, executor and executrix respectively of the last will and testament of the said James Graham, deceased, plaintiffs, against John Ross, defendant, for foreclosure and an injunction under the circumstances stated in the judgment.

The writ was issued on October 28th, 1882.

The action was tried at the assizes at Brampton, before Hagarty, C. J. Q. B., on September 13th, 1883.

E. Stonehouse, for the plaintiffs.

Beynon, for the defendant.

October 23rd, 1883. HAGARTY, C.J., Q.B.—The defendant purchased one hundred acres in Euphrasia from the plaintiff's testator, at the price of \$1000, and gave back a mortgage dated October 4th, 1881, for payment of the whole purchase

money payable in nine equal annual instalments, the first payable on October 4th, 1882, with interest at six per cent. to be paid annually with each instalment on the whole unpaid principal, the mortgagor to have the privilege of paying off at any time in payments of not less than \$100 each.

There were covenants for payment, and also a covenant that the mortgagor would clear up and fence fit for cultivation ten acres in each year for five years following the date of the mortgage, and also build a good log house eighteen feet by twenty-four, within one year from the date of the mortgage. Proviso that in default of carrying into effect this covenant, the mortgage should become immediately due and payable, "after default being made in building the house and clearing said land at the periods of time above mentioned." And in default of payment of any instalment of interest, the principal should at once become payable.

The plaintiff charges that default was made in payment of the first instalment of interest: that the defendant has not cleared and fenced fit for cultivation ten acres of the land in each year: that he has not built a good log house within a year from the date of the mortgage, by reason whereof the whole of the principal has become due and payable: that there was much valuable timber on the lot which was a material part of the plaintiff's security and without it the premises would be an insufficient security: that the defendant has cut and is proceeding to cut large quantities of the timber.

The plaintiff claims payment of the \$1000, and interest, and costs, and in default foreclosure: that the defendant be ordered to deliver up possession: and that he be restrained from cutting timber, &c., and for further relief. (a)

(a) The plaintiff claimed (1) payment of what was due under the mortgage with the costs of the action, or in default foreclosure: (2) An order for immediate payment: (3) An order for possession: (4) An injunction restraining the defendant from felling, cutting, &c., for railway ties, or any other form of timber, any of the trees, wood, or timber growing on the mortgaged premises, or from removing from the said premises any railway ties, wood, or timber being thereon, or in any way depreciating his security, all necessary directions and accounts and further relief.

The defence asserts that the first instalment of interest was duly paid, and that the defendant did clear up and fence fit for cultivation ten acres the first year. The defendant denies that he cut timber except for clearing the land as required by the mortgage: that there is any sum due for principal or interest, and denies default generally so as to make the whole of the mortgage due.

Issue.

The trial took place before me at Brampton, and many witnesses were examined on each side. I think it was proved, (and I so find) that the defendant entered into possession at once and cleared over ten acres fit for cultivation within the first year, and put fall wheat into seven or eight acres of it, and in the following spring put spring wheat into the residue. It was not fenced till the spring. The house was not built within the prescribed time, viz., by October 4th, 1882. But within a very short time later in October, or early in November, say within about a month after the expiry of the year the house was built, but not fully completed. It was sworn that a couple of days' work would render it fit for habitation. The first instalment of interest was duly paid.

The defendant was engaged in making the ten acre clearing for the second year. But in April of this year the plaintiff procured an injunction restraining the defendant from cutting any timber whatever on the lot on affidavits to the effect that he had broken his covenant as to building and clearing, and that he was cutting and removing the valuable timber and thereby reducing the mortgagor's security for the purchase money. The defendant unsuccessfully opposed this motion.

The effect of this was completely to stop all his work. The writ in this case was issued on October 28th, 1882, the first year only expiring on the fourth of the same month. In my opinion the evidence for the defence wholly outweighed that adduced for the plaintiff. The plaintiff's witnesses had gone up on one or two occasions and went over the lot as they say coming from a very long distance. The

witnesses for the defence were persons resident close to the land, and from their appearances and the manner of giving their evidence impressed me much with their trustworthiness.

Their means of knowledge appeared certainly far superior to those possessed by the plaintiff and his witnesses, who seemed to have but scant knowledge of the exact locality or boundaries. I am satisfied that the application for the injunction was made without proper grounds, and the defendant proved to my conviction that he had not cut, or removed or sold timber, except in the *bond fide* pursuance of his covenant to clear so much each year. He was not in any way prohibited by the mortgage from cutting or selling timber from the lot he had purchased, and it is idle to urge that he should not carry away, or sell the timber off the part he was clearing for cultivation. I think the plaintiff failed to shew a deterioration of his security by reason of defendant's dealing with the lot.

Several persons living in the neighbourhood, one a farmer being twenty-nine years near the lot swore that they considered it was from \$200 to \$300 improved in value since the plaintiff sold it to the defendant.

I am strongly of the opinion that but for the injunction the defendant would have duly cleared and fitted for cultivation, the ten acres for the second year. I find that the only default made by the defendant was in not building the house, within the first year. I hesitate before finding a forfeiture as to not putting up the fence during the first year, if the case rested merely on that.

The substantial part of the covenant was to have ten acres fit for cultivation. It was so fit, and the crop was nearly all in within the time, but the fence was not put there till the following spring, not an unusual thing in new ground. As set forth in plaintiff's claim, the mortgage provides that it should immediately become due and payable after default being made "in building the said house and clearing the said land at the periods of time above mentioned."

But giving the plaintiff the benefit of the doubt on this last point his claim is narrowed down to the non-building of the house and the delay in the fencing. I can hardly understand the necessity for his seeking to enforce his extreme rights on the facts in evidence before me. I can only understand his conduct as resulting from a wholly mistaken notion that the defendant was despoiling the land of its timber and thereby destroying his security.

The extraordinary haste with which the writ was issued, although the defendant had duly paid the first instalment of the interest on the whole purchase money, and was applying to him for an extension of the time for putting up the house, seems to suggest either a hasty action on untrustworthy information, or a harsh desire to take advantage of the extreme letter of the law.

I think the plaintiff has failed in every part of the case which was really in controversy. There was no real dispute as to the house and the fence. He has put the defendant to very heavy cost and expense, wholly out of proportion to the value of the amount in dispute, and inflicted serious loss on him by stopping all his clearing operations by the injunction. It is not easy to place the matter now in a very satisfactory state in consequence of the plaintiff by his own act, having, as I hold, prevented the defendant from clearing the prescribed quantity in the second year according to contract.

The defendant should not be prejudiced by this, and I think this Court must have the power to protect him. If the plaintiff had merely sought to enforce his extreme rights as to the house and fence, the Court could have granted relief against the forfeiture on proper terms and without heavy cost. I think the plaintiff must pay all the costs of the defendant in the injunction proceedings, and also of this trial, and should have no claim therefor against the defendant.

But I must hold that however harsh the proceeding seems to be, the plaintiff is entitled to insist on a forfeiture of the extended terms of payment in consequence of the breach

of covenants as to the erection of the house. I do not see how equity can relieve against this breach. No compensation can be either estimated or awarded to the plaintiff in respect of such a default. Relief is given against forfeiture for non-payment of rent, and in certain cases for neglecting to insure. I have found no case in which a default like the present has been relieved against.

It must be borne in mind that the default is not insisted on to wholly defeat the estate of the defendant, but merely to deprive the mortgagor of the benefit of the extended terms of credit. The mortgage provides for the whole remaining purchase money becoming due in the event either of non-payment of any instalment of principal or interest, or on default of building the house, clearing, or fencing according to the covenant.

The decision of the Lord Justices in *Sterne v. Beck*, 1 DeG. J. & S. 595, in 1863, is clear that a Court of Equity, would not relieve against a provision declaring that on default of payment of a part the whole should become due. Knight Bruce, L. J., says, at p. 600: "The deed provided for payment of the debt by instalments * * and further provided that in a certain event payment of the debt should be accelerated. It did not provide that the amount payable should be increased, but only provided that instead of being paid at future periods with interest up to these periods it should become payable at once with interest up to that time. To a proviso of such a nature none of the principles of equity relating to relief in the case of penalties are in my opinion applicable."

I do not very clearly understand the exact state of the law on this subject in our Court of Chancery, looking at the cases from *Knapp v. Cameron*, 6 Gr. 559, in which the rule of that Court of June 13th, 1853, Order 32, sec. 5, *Taylor's Orders*, p. 336; *Snelling & Jones Orders*, p. 132, is referred to, down to *Cruso v. Bond*, 9 O. P. R. 111, (b) and *Tylee v. Hinton*, 3 A. R. 53. I fully concur with the expression of opinion of Moss, C. J. A., at p. 60, of *Tylee v. Hinton*.

(b) Reported in appeal, 1 O. R. 384.

I was under the impression that it was now considered clear in this Province, that equity would not relieve against such a proviso, but I cannot now refer to the authority. But I have not to decide such a point, the default here relied on is the failure to erect the house, &c.

This I consider beyond the right of equity to relieve against. The plaintiff sells the defendant a lot for the price of \$1000, payable in instalments ranging over several years. The parties agree that a house shall be erected within twelve months, and if that be not done the whole purchase money should become forthwith payable. A vendor has I think a clear right to make the doing of specified improvements a condition of extended time for payment, they would be an additional security to him, and on failure to complete them as agreed he should be allowed to request payment of the whole forthwith.

The subject is fully discussed in the elaborate notes to *Peachy v. Duke of Somerset*, and *Sloman v. Walter*, 2 Wh. and Tud. L. C. 1082, 1094. See also Snell's Eq., 6th ed., p. 337; *Hill v. Barclay*, 18 Ves. 56; *Bracebridge v. Buckley*, 2 Pr. 200; *Job v. Bunister*, 2 K. & J. 374; *Nokes v. Gibbon*, 3 Drew. 681; *Croft v. Goldsmid*, 24 Beav. 312. I think there must be the usual reference to the Master to take the account of the whole amount due and the usual order for payment within the time required by the practice of the Court and in default that the equity of redemption be foreclosed.

I consider the proceeding of the plaintiff in the institution of this suit to have been unnecessarily harsh, and that while his right is accorded to him all the costs to which he has put this defendant by his application for injunctions and for forcing him to trial on unfounded allegations as to the timber, &c., must be paid by him to the defendant without reference to any costs ultimately to be paid to the plaintiff.

I direct that the plaintiff pay to the defendant all costs of the latter in the suit from the time of appearance to the writ of summons down to this decree, including costs of injunction and trial.

By insisting on the forfeiture and foreclosing, the plaintiff gets the benefit of all the defendant's improvements and also the house which has been erected, though not within the stipulated time. The evidence was to the effect that the lot was improved by the defendant's work from \$200 to \$300. I think the plaintiff should have no costs of suit or of reference. It seems to me to be a case eminently calling for the exercise of the discretion as to costs given to the Judge.

A. H. F. L.

[CHANCERY DIVISION.]

McFARREN V. JOHNSON.

*Specific performance—Contract contained in letters and telegrams—
“Coming to accept”—Parties not ad idem.*

M. offered to give J. \$1,500 for a certain lot of land containing a 50 feet frontage. J. replied that he would take \$1,750 for the 50 feet, or \$1,500 for 35 feet of the 50 feet. Before receiving any answer, J. telegraphed to M.: “Coming Monday to accept \$1,500. Waiting immediate reply.” M. telegraphed back: “Come at once.” M. now alleged that these telegrams constituted a contract for the sale of the 50 feet to him for \$1,500, and claimed specific performance. *Held*, that the telegrams did not constitute any such contract, for it was ambiguous to which proposal of \$1,500 J.'s telegram referred, and moreover the words “coming to accept” did not shew an actual acceptance, but were merely an expression of intention to do something in the future.

THIS was an action for the specific performance of an alleged contract for the sale of certain land.

The plaintiff in his statement of claim alleged that, in June, 1883, the defendant contracted and agreed in writing with him to sell to him certain lands in Toronto, for \$1500: that the said contract was in writing and signed by both himself and the defendant, and in and by the same the purchase money was payable in cash: that the defendant now neglected and refused duly to perform the said contract on his part, and repudiated the same, and was in possession of the land in question: and he

claimed specific performance of the contract, and investigation of the title of the land under the direction of the Court, a conveyance thereof to himself free from all incumbrances, possession, costs of suit, and further relief.

By his statement of defence the defendant denied the allegations in the statement of claim: or that he entered into any contract with the plaintiff for the sale of the land in question, and he claimed the benefit of the Statute of Frauds.

The evidence adduced to prove the contract is sufficiently set out in the judgment.

The case came up for judgment on October 30th, 1883, before Proudfoot, J.

D. McMichael, Q.C., for the purchaser.

J. E. Rose, Q.C., contra, referred to *Long v. Millar*, L. R. 4 C. P. D. 450; *Benjamin* on Sales, 3rd ed., p. 257; *Fry* on Spec. Perf. 2nd ed., pp. 119, 122.

November 7th, 1883. PROUDFOOT, J.—On May 30th, 1883, the plaintiff sent a postal card to the defendant offering him \$1,500 cash for a lot on Queen Street east, in Toronto, owned by the defendant, with a small cottage upon it, and having a frontage of about fifty feet.

The defendant replied by letter on June 11th, 1883 referring to the plaintiff's offer, and says: "You offer \$1,500, and I ask \$2,500. Now, I might be induced to meet you half way, and take \$2,000 cash."

The plaintiff, on June 13th, answered this letter, saying, among other things tending to shew that his offer was a good one, that the defendant said he had fifty feet frontage on Queen street, but that really he had only thirty-five feet, as fifteen feet of that frontage would require to be left for an entrance for the purpose for which the plaintiff required it, as there was no rear entrance to the lot, except by a lane that could be at any time stopped should the owners so desire.

The defendant replied on June 19th, stating his wil-

lingness "for the thirty-five feet frontage back to the lane and the useless rear, I am willing to take \$1,500, and retain the fifteen feet and said rear. * * I have to make you one more offer. After ten days, should I not obtain a better offer from other quarters, I will split the difference once more between us, and take \$1,750 cash, and come up and transfer the property into your hands * * Should you accept of my offer, however, I shall be quite willing to pay the half or the whole of it," (*i. e.* of the legal expenses attending the transfer of the property.)

So far it is plain the parties had not arrived at any agreement. The plaintiff had offered \$1,500 for the fifty feet, the defendant asking \$1,750. The defendant had offered to take \$1,500 for the thirty-five feet.

Before receiving any answer to his offers in the last letter, the defendant telegraphed on June 25th (Monday): "Coming Monday to accept \$1,500. Waiting immediate reply." On the same day the plaintiff telegraphed in answer: "Come at once."

The whole question is, whether these telegrams are sufficiently connected with the previous offer of the plaintiff of \$1,500 for fifty feet, and if so, whether they form a concluded agreement.

I think the question must be answered in the negative. Assuming the subject of the letters and the telegrams to be sufficiently identified by laying them side by side, (see *Long v. Millar*, L. R. 4 C. P. D. 454), to which proposal of \$1,500 does the telegram from the defendant of June 25th refer? The defendant says: "Coming to accept \$1,500. Waiting immediate reply." The word *accept* might mean to accept an offer made to him; it may also mean to accept the money on the offer made by himself, and this latter, I think, is the meaning here, for he immediately adds, *waiting reply*. If he were intending to accept the plaintiff's offer, there was no need of a reply. The reply he wanted was to know if the plaintiff would give him \$1,500 for the thirty-five feet, or in other words, accept the defendant's offer. The plaintiff's reply is, therefore, I think, an accept-

ance of the defendant's offer. The plaintiff says it is not, I must therefore conclude that the parties never arrived at the same mind upon the subject.

But assuming this not to be the true construction of the telegrams, still they do not shew a final agreement. The defendant says he is *coming* to accept a week later. That does not shew an acceptance. It does not amount to more than the expression of an intention to do something at the end of a week—and this he never did.

I conclude, therefore, that there never was a final agreement between the parties, or that the letters and telegrams do not prove it.

The action is dismissed, with costs.

A. H. F. L.

[COMMON PLEAS DIVISION.]

REGINA V. MACKENZIE.

Indian Act, 1880—Conviction—Giving liquor to Indians—Imprisonment in default of payment of fine—Disposal under medical or religious sanction—Amendment after return of certiorari.

A conviction under the Indian Act, 1880, for giving intoxicating liquor to an Indian imposed a fine and costs, and in default of immediate payment, imprisonment.

Held, that the conviction was invalid and must be quashed, for while sec. 90 provides as punishment for the offence, imprisonment or fine, or fine and imprisonment, it does not authorize a fine, and in default of payment, imprisonment; and that the defect was not remedied by sec. 98, which enacts, that no prosecution, conviction, &c., under the Act shall be invalid on account of want of form, so long as the same is according to the true meaning of the Act.

Held, also, that the conviction was invalid because it did not negative that the liquor was made use of under the sanction of a medical man or minister of religion.

Held, also, that an amended conviction cannot be put in after the return of a writ of certiorari.

This was a motion to make absolute an order *nisi* to quash a conviction under section 90 of the Indian Act, 1880, for that the defendant "did give intoxicating liquor to an Indian man, one Andrew Statts, contrary to the Indian Act, 1880."

The conviction was in the following form :

Canada,

Province of Ontario,

County of Brant,

To wit.

Be it remembered that on the eighth day of January A.D., 1884, at the city of Brantford in the county of Brant James Bovell MacKenzie is convicted before the undersigned an Indian Agent for the counties of Brant and Haldimand, for that the said James Bovell MacKenzie on the 12th day of October, A.D., 1883, at the city of Brantford in the county of Brant, did give intoxicating liquor to an Indian man, one Andrew Statts, contrary to the Indian Act, 1880; and I adjudge the said James Bovell MacKenzie for his said offence to forfeit and pay the sum of \$50, to be paid and applied according to law, and also, to pay the sum of \$24, the costs of prosecution in this behalf; and if the said several sums be not paid immediately I adjudge the said James Bovell MacKenzie to be im-

prisoned in the common jail of the said county of Brant, at Brantford, in the said county of Brant, for the space of three months, unless the said sum and costs be sooner paid.

Given under my hand and seal the day and year first above written at Brantford in the said county.

J. P. GILKINSON,
Indian Agent,
Counties of Brant and Haldimand.

The information and complaint was sworn before James Weyms, Police Magistrate of Brantford on the 10th of November, 1883, by "George H. M. Johnson of Onondaga township." * * "Who saith that James B. MacKenzie did on the 12th of October, 1883, at the city of Brantford, give intoxicating liquor to an Indian man contrary to the Indian Act of 1880."

Objection having been taken to his proceeding with the hearing, the Police Magistrate on the 22nd December, in writing, requested Mr. Gilkinson "to adjudicate upon certain information laid before me for infractions of the Indian Act, against one James B. MacKenzie." The request was made, as appears in the request, under the provisions of sec. 6, R. S. O. ch. 72. Mr. Gilkinson having consented to act, it appeared that on the 29th of December a summons was issued requiring the defendant to appear before Mr. Gilkinson on the 5th of January, 1884, to answer the charge. The defendant did not appear in person on the return, but was represented by counsel, Mr. A. J. Wilkes, who objected to Mr. Gilkinson "sitting on the case, upon the ground of supposed prejudice; also, because the defendant is absent in Bothwell unable to be here." Thereupon "Constable Hall being sworn said, he he served the defendant with summons on last Saturday, (29th December,) to appear here to day. Mr. Wilkes now objects to my powers or jurisdiction." Mr. Gilkinson determined to proceed, and, having read the information, one Peter Newhouse was sworn as an interpreter. Mr. Wilkes then "intimated he would withdraw, which he did."

Evidence was then taken, and the Magistrate declared

"the case closed." No evidence was offered for the defence; and the case was adjourned until the 8th of January for the purpose of giving judgment.

On the 8th of January, the magistrate gave judgment, which, after reciting his reasons, was in the words following: "The judgment of the Court is, you James B. MacKenzie do pay a fine of \$50, with costs of prosecution, and, in default of immediate payment, that you be committed to the gaol in Brantford until such fine and costs are paid, such imprisonment not to exceed three months."

The magistrate noted that the defendant was present with his counsel Mr. V. MacKenzie, Q. C., during the reading of the judgment.

On the 5th day of February the papers having been returned in obedience to a writ of *certiorari* issued pursuant to an order of Galt, J., an order *nisi* was obtained from Cameron, J., calling upon the said Jasper P. Gilkinson and George H. M. Johnson to shew cause why the conviction and all proceedings thereunder should not be quashed upon the following grounds.

1. The said magistrate had no jurisdiction to act in the city of Brantford of his own motion and did not assume so to act, but at the request of the police magistrate, assumed to continue an investigation of a charge pending before the police magistrate, which he had no power to do.

2. The proceedings before the police magistrate had been allowed to lapse, and the said Gilkinson had no power to act upon the information laid before the police magistrate.

3. The convicting magistrate had no power to impose a term of three months imprisonment or any term of imprisonment on default of the payment of the fine.

4. That the conviction does not set out by whom the information was laid, or shew upon what information the conviction is made, or to whom the costs are payable.

5. That the conviction does not shew that the proceedings were taken before a competent tribunal.

6. That sections 90 and 97 of the Indian Act, 1880, are *ultra vires* of Dominion Legislature.

7. The conviction does not set out that the intoxicant was not made use of under the sanction of a medical man or under the direction of a minister of religion, nor does the evidence shew that the matter does not come within the closing proviso of clause 90.

8. There is no evidence to shew that Andrew Stats in the conviction mentioned is an Indian, within the meaning of the Indian Act, 1880.

On February 19, 1884, *Mackenzie*, Q. C., supported the motion.

Holman, contra.

April 18, 1884. ROSE, J.—Mr. Holman states that the 1st and 2nd objections taken in the order *nisi*, were argued before Hagarty, C. J., on a motion by the defendant for a writ of prohibition, and were overruled. Mr. MacKenzie does not admit this, and I have nothing before me to shew how the fact is. It is not material, as my present impression is that they are not tenable, and I have formed an opinion in the appellant's favour on other grounds.

As to objection 3. Section 90 of the Indian Act, 1880, provides that the punishment for the offence of which the defendant is convicted may be imprisonment *or* fine, or fine *and* imprisonment, but does not provide for a fine and imprisonment in default of payment of the fine.

The provisions upon which the magistrate has acted are found in the same section, but are confined to punishment of the commander of a steamer for supplying liquor to Indians.

If a fine had been inflicted as might have been done without saying anything about the means of enforcing its payment then sec. 57 of 32 & 33 Vic. ch. 31 would apply, and imprisonment could have been awarded, but only after failure to recover by distress or under the provisions of sec. 59, where it was made to appear to the Justice that

distress would be ruinous to the defendant and his family, or that he had no goods.

It seems to me the magistrate has fallen into an error by misreading the section, and that the judgment and conviction are not in accordance with the provisions or meaning of the Act. If so, then this defect is not remedied by the provisions of sec. 98, enacting that "no prosecution, conviction, or commitment under this Act shall be invalid on account of want of form, so long as the same is according to the true meaning of this Act."

I am also of the opinion that the seventh objection is well taken. It will be observed that the information does not negative the exception in clause 90, so as to give the prosecutor the benefit of the provisions of sec. 144, 32 & 33 Vic. ch. 31, and thus render it unnecessary for him to "prove the negative." There is no evidence to "prove the negative," and the conviction does not negative the exceptions. To give intoxicating liquor to an Indian may be no offence whatever under the Act: *Regina v. White*, 21 C. P. 354, at p. 356.

I do not express any opinion on the other objections. Mr. MacKenzie cites as authority in support of the fourth objection: *Regina v. Maybey*, 37 U. C. R. 248; *Re Hennesy*, 8 U. C. L. J. 299, referring to Dickinson's Q. S., 6th ed., 876.

Mr. Holman desired to file an amended conviction, which Mr. MacKenzie resisted on the following grounds:

1. The application is too late after a return to the writ of *certiorari*, citing *Regina v. Smith*, 35 U. C. R. 518, at p. 522, where Richards, C. J., says: "Up to the time of return and filing the Justices may amend the conviction, but after the filing of the papers no amendments can be made."

2. That no power was given to amend a conviction brought up on *certiorari*, citing the opinion of Osler, J., in *Regina v. Lennon*, 44 U. C. R. 456, at p. 461; also, secs. 67, 68, 32 & 33 Vic. ch. 31, D., and sec. 2, of 33 Vic. ch. 27. D.; *Paley on Convictions*, 6th ed., p. 392.

I think these objections to Mr. Holman's application are entitled to prevail.

The conviction must, in my opinion, be quashed, but without costs.

Conviction quashed.

[COMMON PLEAS DIVISION.]

HEWISON V. THE CORPORATION OF THE TOWNSHIP
OF PEMBROKE.

Municipal corporations—By-law closing road—Councillor interested—Road running through several municipalities—Power to close—Rule nisi.

An application to quash a municipal by-law must be by rule nisi, and not by notice of motion.

A road, originally a trespass road, running from Ottawa to Pembroke, through more than one county, following the course of the Ottawa River, had been used for upwards of forty years, and had become a public highway. The road in its course intersected diagonally lots 1 and 2, owned respectively by the applicant and D. In October, 1882, D., who was then, and had been for the three previous years, a member of the township council, petitioned the council to pass a by-law closing up this portion of the road, and procured E. and M., two of the council, to pledge themselves to support the by-law, in the belief that it was for the public benefit—D. agreeing to expend \$100 on the side line, and on which it was voted to have the bulk of the statute labour performed—but on their discovering that it was against the public interest, they asked D. to release them from their pledge, which he refused to do. He, however, pretended that he was not anxious for the passage of the by-law, and petitioned the council representing that his land might be injuriously effected thereby, and asked to be heard by counsel; but as he wished, as he said, "to be let down easy," he arranged that E. should support the by-law, which D. said would be defeated. E. accordingly voted for it, as also did M., and another councillor, D. being absent, and the reeve not voting, and in consequence the by-law was carried. D.'s counsel, who was also counsel for the township, attended the council meeting and spoke in favour of the by-law. It appeared that D. had guaranteed the council against all expenses in the matter. It also appeared that the applicant had some buildings on his lot adjoining the road, which were used by farmers and others, the approach to which would be cut off by the closing of the road.

Held, under the circumstances, the by-law must be quashed with costs.

Quære, whether there is any power to close up a road of this kind running through more than one municipality.

THIS was a motion for an order absolute to quash a by-law No. 131, passed by the municipal council of the township of Pembroke closing that portion of the Pembroke and Ottawa Road which crosses lots 1 and 2 in the 3rd con-

cession of that township, and vesting the same in the owners of such lots.

The by-law was passed on the 25th of November, 1882. The order *nisi* was obtained on the 24th of November, 1883, but was not served until after the year had expired.

December 18, 1883. *MacLennan*, Q.C., and *Metcalfe*, in support of the order.

Aylesworth and *Deacon*, contra.

May 2, 1884. ROSE, J.—Mr. Aylesworth took a preliminary objection, that the motion should have been on notice under Rule 408, and the order *nisi* should be taken merely as a notice, and not having been served until after the expiration of the year, was too late.

After hearing Mr. MacLennan, I overruled the objection as the authority to make the motion is not derived from the Rules, but from section 322 (or 334 of 1883) of the Municipal Act, (see Rule 404) and by that section the procedure is to be by rule.

In my opinion the application was made within the year.

Mr. Aylesworth then objected that if the by-law was under section 525 of the Act, (566 of 1883) the motion was premature as the by-law had not been confirmed by a by-law of the County Council.

This objection was but faintly pressed, as the road in question was not an original allowance for road, and therefore sub-section 28 could not apply. The council had evidently assumed to act under sections 506 and 509 (546 and 550 of 1883.) This objection therefore fails.

As the road runs from Ottawa to Pembroke, and is, therefore, not within the limits of the municipality, I am unable to satisfy myself that the Township Council has any power to close or divert it at all. And it may be that there is no power given to any municipal body to interfere with a section of a road running through more than one municipality. Section 524 (565 of 1883) provides for a County Council "opening * * stopping up roads * *

running or being within one or more townships." "One or more" possibly should be read "more than one." Unless this section gives power to stop up a section of a continuous road running say through more than one county, no express language can be found giving such power. It would seem anomalous that a section of a road such as the Kingston Road, running from Kingston to London under various names, and possibly farther both east and west, could be closed or diverted by a township council.

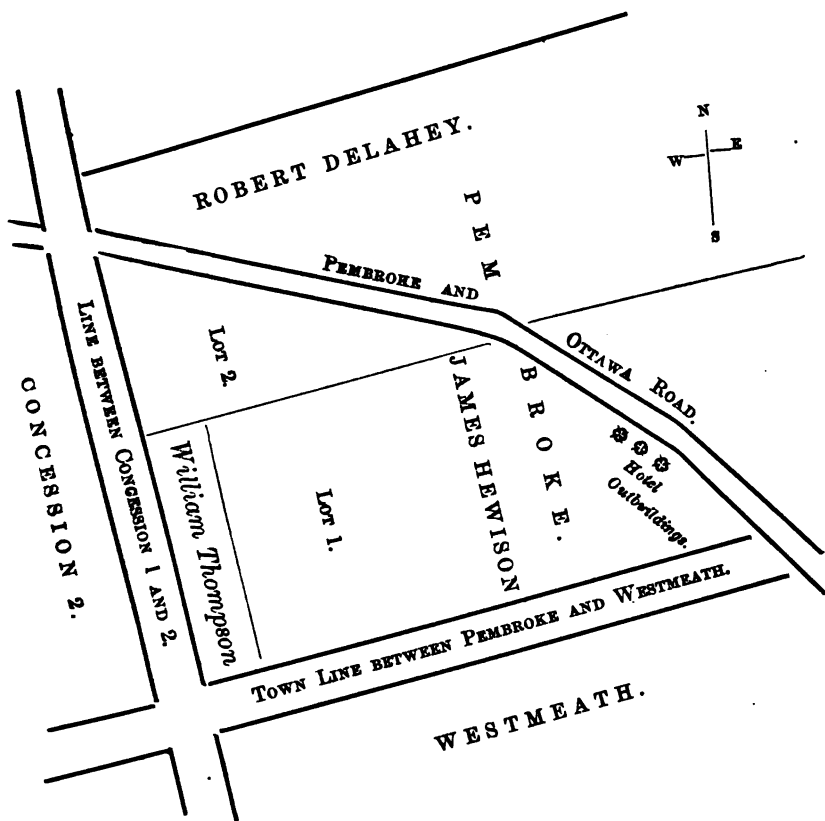
If such power has not been given to township councils then this by-law is *ultra vires* of the council of Pembroke.

I do not find it necessary to determine this point. Had I found it necessary I would have requested counsel to further argue it, as it being suggested to counsel on the argument they were unable to argue it fully without consideration. Had it been fully considered by them probably I should not feel any difficulty as to it, judging from the very careful and finished arguments addressed to me on the other points of the case.

In order to reach the point on which it seems to me I should dispose of this motion, it will be necessary to examine the facts. The evidence is voluminous, covering over two hundred pages of foolscap paper. I have in consequence been unable to give judgment earlier as I could not devote the time necessary for the perusal of all the papers.

The road, as I have stated, runs from Ottawa to Pembroke, following as nearly as may be the course of the Ottawa river. It was originally probably a trespass road, and has been used over forty years as a public highway. Over thirty-five years ago the portion of the road running through this township, and possibly elsewhere, was apparently straightened and the present track was adopted with the consent of the then proprietors, and has ever since been used as a public highway. Statute labour has been performed, government and municipal moneys expended, bridges built at the expense of the counties, and it has been dedicated to the use of the public as I have stated.

At the lots in question the road runs in an almost westerly direction crossing the lots diagonally, the south-easterly boundary of lot one, belonging to Hewison, adjoins the township line between Pembroke and Westmeath, along which line is the usual road. This road intersects at right angles the concession road forming the south-westerly boundary of lots one and two. The road in question intersects both roads forming in fact a right angle triangle. The following diagram will illustrate:



The line and concession roads have been in use as public highways for about twenty-five years.

Robert Delahey was, in the year 1883, and three preceding years, a member of the Township Council of Pembroke.

On the 16th of October, 1882, Delahey presented a petition to the council applying "for a by-law to have that part of the public road commonly called the Pembroke and Ottawa Road * * which crosses lots numbers one and two * * stopped up and closed. Notice of the intended by-law was given as provided by section 506 of the Act, and petitions *pro* and *con* went to the council.

On the 22nd of November, 1882, Delahey presented a petition to the council stating, clause 3, "That your petitioner's lands might be prejudicially affected by the stopping up of the said road, and your petitioner is therefore desirous of being heard by his counsel before the said council on the matter of the stopping up of the said road."

Parties adverse to the opening up of the road were heard, and the council passed the by-law complained of. Delahey withdrew from the council board and did not vote, but his counsel was heard in advocacy of the by-law. His counsel was also solicitor for the township council. The Reeve did not vote, as the remaining councillors Fraser, Ellis, and Mitchell voted for the by-law.

Delahey at the same meeting lodged with the clerk a bond—in the penal sum of \$500—the recital in which is as follows: "Whereas the said Corporation of the township of Pembroke, at the request of the said Robert Delahey, has this day passed a by-law to stop up," &c., "upon the understanding that the said Robert Delahey should save and keep the said corporation harmless and indemnified against the costs of any application to quash the said by-law, and the said Robert Delahey is willing so to do."

It is stated that it was a condition imposed and agreed to by Delahey, that he was to do certain road work on the line roads, and, although the agreement is denied by Delahey, he does not deny that he has expended some \$100 on the road prior to the passing of the by-law, as is sworn to by Ellis and Hewison.

It will be observed from the plan, that closing that portion of the road would free Delahey's farm of any road and leave him free access to the line road to the south, and that it would remove from the front of Hewison's buildings the approach thereto. It is stated that Delahey was anxious to have the road closed as he was apprehensive that a projected railway would cross his farm, further cutting it up.

Hewison's buildings are apparently used as a stopping place by farmers and others, although not licensed.

There is the usual contradicton by affidavits as to the by-law being in the interest of the public or otherwise. The preponderance is, I think, with Hewison. Certainly in number, and apparently in influence.

In reply to affidavits by Delahey and his friends is an affidavit by Ellis, one of the councillors, to which, if credit be given, there can be only one result to this application.

The only answer to it is an affidavit by Mr. W. H. Deacon, who was solicitor for the township, and also for Delahey. He states he does not question the veracity of Ellis, for whom he has a great respect, and with whom he is on most friendly terms. He adds that Ellis is old and excitable, and thinks his memory is impaired, and that he has not a clear recollection of certain facts stated in his affidavit, and as to which Mr. Deacon's recollection is not the same as his. Mr. Deacon also explains that he does not answer Ellis's affidavit by affidavits of those to whom the alleged facts would be known because that Hewison's solicitors did not let him see them in time.

I hardly think this will enable me to disregard Ellis's affidavit and refuse to believe his sworn statements. I do not remember, and have not noted, any application on behalf of Delahey for time to answer these affidavits. Moreover, as will appear, Ellis's statements are in harmony with the undisputed facts.

Ellis states that in the spring of 1882, Delahey obtained from him while sitting at the council board a promise to support a by-law if introduced for such purpose : that this promise was given without the knowledge of the facts,

and on the understanding that the other members of the council had, after consideration, so agreed: that in May following Delahey called upon him and asked for a pledge, on condition that he Delahey would first make some repairs on the original line and concession roads, and that he Ellis gave him the promise or pledge, and pursuant thereto, in the same month, voted to have the bulk of statute labour expended upon the town line: that Delahey made some repairs under the said agreement which was also arrived at with other members of the council: that when the public became aware of the proposed action of the council, a feeling of indignation arose: that consequently he went and made a personal examination of the roads, and became convinced the proposed by-law was not in the public interest: that he accordingly went to Delahey and endeavoured to get a release from his promise, agreeing to get the council to reimburse him for all his outlay, or, if they would not, he would pay him \$100 out of his own pocket to cover the same, but that Delahey declined: that he then went to Mr. Thomas Deacon, senior member of the firm acting for Delahey, and got him to go with him and make an examination of the premises so as to get Mr. Deacon to use his influence with Delahey not to press the matter: that Mr. Deacon did go with him, and also saw Delahey, but he did not know what was the result of the interview: that a day or two before the passing of the by-law Delahey called upon him and stated that he intended to act on his advice and to abandon the project but wished to be "let down easy," as he expressed himself: that he suggested that Delahey should appear at the meeting of the council and object to the passing of the by-law, and that on his objection it would drop: that Delahey did appear, and that, in order to carry out the arrangement, he, Ellis, gave an apparent support to the by-law, being however bitterly opposed to it: that Delahey did not carry out the proposed arrangement, but that he, Ellis, not having heard from him, supposed that he did not intend to have the by-law carried into effect by closing the road, and voted for the by-law.

He further states that Mitchell frequently stated that Delahey had exacted a similar promise from him, he being at the time ignorant of the facts: that Mitchell went down with him, Ellis, to examine the ground, and then stated that he did not think the project was in the interest of the public, and subsequently said he had gone to Delahey and urged him to release him from his promise which he had declined to do. Mitchell's affidavit, to which this is a reply, is not in harmony with this statement. But John Dunlop deposes to a conversation with Mitchell in which Mitchell made to him statements of facts similar to those sworn to by Ellis.

I think I must therefore accept Ellis's statement corroborated by Dunlop.

Ellis further states that the bond was given by agreement between Delahey and the council: that in pursuance of an agreement between Delahey and the council, that the council was to be at no expense, Delahey paid for all the advertizing, notices, by-law, bond, conveyance, and other papers and documents evidencing the regularity of the proceedings. Extracts from the minutes of the council are annexed to Mr. Ellis's affidavit, two of which I extract:

"Mr. W. H. Deacon, counsel for Mr. Delahey, was heard before the council in support of the passage of the above mentioned by-law."

"Mr. Delahey handed in the proof that the proper notices required in the matter of the above mentioned by-law were posted up; also a bond to the council."

The voluminous evidence affords very many other items on this point worthy of observation, but I think I have referred to sufficient to bring this case within and carry it far beyond the facts in *Re Peck and Corporation of Galt*, 46 U. C. R. 211, and *Re Vashon and Corporation of East Hawkesbury*, 30 C. P. 194, at p. 202.

It seems to me that the spirit of the law that requires a majority of three out of five councillors has been violated here. Delahey did not vote, nor did the Reeve. Ellis and Mitchell, as I find to be the fact, voted contrary

to their convictions and under pledge to Delahey, leaving only one unbiassed vote for the by-law.

Again, can any one come to the conclusion that the by-law was introduced and passed in the interests of the public.

I have not overlooked the evidence given to that effect, but the uncontradicted facts marshall themselves with too great force to be thus overcome.

We find here a councillor whose interest it is to procure the passage of the by-law sending in a petition for it. And when he swears that he sent in the petition merely as a matter of form to initiate the proceedings which the council desired to commence, it is difficult to square such statement with his other acts. We also find him doing a hundred dollars worth of work as a preliminary, employing a solicitor to prepare a by-law, advertisements, notices, bond, conveyancing, appearing by counsel to advocate its passage, pledging two members to vote for its adoption, and having paid all expenses preliminary to and consequent upon its adoption, giving a bond to indemnify the council against any costs incurred by reason of any application to quash. We find the solicitor for the corporation, solicitor and counsel for Delahey, preparing the papers, appearing before the council to advocate his claims, and before the Court to sustain the by-law. Ellis says the bond was given pursuant to agreement. Delahey says it was not. The recital in the bond corroborates Ellis's statement. Ellis states that Delahey agreed to appear and oppose the by-law, so that it might be dropped, and states that the interview was a day or two before the passage of the by-law. We note that the by-law was passed on the 25th, and on the 22nd a petition was presented to the council signed by Delahey requesting that his counsel be heard as his Delahey's lands might be prejudicially affected by the by-law. Ellis says that in the meantime he, Delahey, changed his course of action, and we find that on the 25th Delahey's counsel appeared and advocated the passage of the by-law. The members of the counsel who pledge their oaths that they were acting in the interest of the public and not of Delahey

may have thought so, but so many suspicious circumstances surround the transaction that in the interest of that purity which must ever clothe the administration of all public trusts, if we desire to preserve our personal and national honour, I think it best to quash the by-law and leave it to another council to re-consider the whole matter freed, if possible, from the many questionable acts that have characterized the passage of the present by-law.

The order will be absolute to quash the by-law, with costs.

Order absolute.

[COMMON PLEAS DIVISION.]

BRODIE v. THE NORTHERN RAILWAY COMPANY.

Railways—Carriage of goods beyond defendants' line—Carriers—Warehousemen—Loss by fire—Negligence—Proximate cause of loss.

Four carloads of flour were delivered to defendants to be carried from Newmarket, Ont., to Chatham, N. B., under a special contract whereby defendants were not to be liable for any delay occasioned by want of opportunity to forward goods beyond places where defendants had stations, but they could forward them to their destination by public carriers or otherwise, as opportunity might offer: that pending communication with the consignees the goods remained on the defendants' premises at the owner's risk; and that defendants were not to be liable after notification to the carriers, that they were ready to deliver the goods for further conveyance; and that defendants were not to be liable for loss by fire. It appeared that the defendants' line did not extend beyond Toronto, and that the goods were to be forwarded by the G. T. R.: that on their arrival at Toronto, they were placed in defendants' freight sheds, and notice, addressed to the consignee, sent to the consignor at Newmarket, and also to the G. T. R. Co., that the defendants were prepared to deliver the goods for further conveyance; and that, after such notice, while the goods were in defendants' freight sheds, they were destroyed by fire without any negligence on defendants' part.

Held, that defendants were not liable as carriers, because they had expressly limited their liability; nor as warehousemen, because no negligence was shewn; the only negligence suggested being that defendants did not procure or supply cars for the transshipment before the fire, but that this was not sustainable; and even if this could constitute negligence. *Quære* whether the recovery could be for more than nominal damages, i. e., whether the loss by fire was the damage naturally resulting from such negligence.

THIS was an action tried before Rose, J., without a jury, at Toronto, at the Spring Assizes of 1884.

It was brought to recover damages for loss by fire of goods delivered to the defendants, to be carried from Newmarket, Ontario, to Chatham, New Brunswick, under the circumstances fully set out in the judgment.

Falconbridge, for the plaintiff, referred to *Ohrloff v. Briscall*, L. R. 1 P. C. 231; B. & L. Prec., 4th ed., p. 129; *Muschamp v. Lancaster and Preston Junction R. W. Co.*, 8 M. & W. 421; *Hately v. Merchants' Despatch Co.*, 2 O. R. 385.

Boulton, Q.C., for the defendants, referred to *Gatliffe v. Bourne*, 4 Bing. N. C. 314; *Cairns v. Robins*, 8 M. & W. 258; *Mitchell v. Lancashire and Yorkshire R. W. Co.*, L. R. 10 Q. B. D. 256, 260; *Aldridge v. Great Western R. W. Co.*, 15 C. B. N. S. 582; *Hughes v. Great Western R. W. Co.*,

23 L. J. N. S. C. P. 153; *Morrison v. Davis*, 20 Penn. 171; *Crawford v. Great Western R. W. Co.*, 18 C. P. 510; *Gordon v. Great Western R. W. Co.*, 25 C. P. 488.

May 7, 1884. ROSE, J. — I am asked to find such negligence on the part of the defendants as would make them liable to the plaintiff for the loss by destruction of the flour in question by fire, on the 9th of November, 1882, the flour being in the defendant's freight sheds when they were burned on that day.

It was agreed that the fire was not occasioned by act of God.

It appears the goods were shipped on the Northern and North-Western Railway, by one V. Dennie, Newmarket, to the order of the plaintiff at Chatham, N. B., on the 27th of October, 1882, consisting of 125 barrels white cream flour, in car 2049 Northern and North-Western, and on the 28th, 125 barrels white cream flour and 200 barrels cream flour to same order at Newcastle, N. B., by three cars of Northern and North-Western Railway: that the flour made four car loads: that three car loads shipped from same address on the 1st November were forwarded: that the cars in question arrived at Toronto, one car on 28th October, and three on 31st October: that they were placed in the freight sheds and notice addressed to the consignee was sent to the consignor at Newmarket, but otherwise no notice was sent to the consignees, and they were destroyed as aforesaid by fire on the 9th November.

The 10th condition of carriage provides for non-liability of the defendants for delay occasioned by want of opportunity to forward goods addressed to consignees beyond the places where the defendants have stations, the condition providing that the goods will be forwarded to their destination by public carrier or otherwise *as opportunity may offer*. It also provides for suffering the goods to remain on the defendants' premises at the owner's risk pending communication with consignees; and further provides that the delivery of the goods by the defendants

will be considered complete and their responsibility to have ceased when they have notified the carriers, to whom they are entitled to deliver them, that they are prepared to deliver the goods for further conveyance; and further provides, that defendants will not be responsible for any loss damage or detention that may happen to goods so sent by them after the notice.

Condition 3 provides against claims for damages occasioned by fire, &c.

It seems in the case before me it was the intention of the parties that Grand Trunk Railway cars should have been provided for shipping flour from Newmarket, but being unable to obtain them the flour was shipped by defendants cars to Toronto, there to be transhipped into Grand Trunk Railway cars to be carried to destination. The defendants' Toronto station is the end of their line for east bound traffic.

It was given in evidence, and is not contradicted, that Grand Trunk Railway furnish cars to the defendant's and notify them of their arrival, when they are loaded by the defendants' men.

The defendants gave evidence that they gave notice of the arrival of the cars in question according to custom, when it became the duty of the Grand Trunk Railway agent to provide cars and notify the defendants when they were so provided.

The agent of the Grand Trunk Railway called by the plaintiff states that the Grand Trunk Railway provided cars for defendants before the fire as follows: On 30th October, three cars; on 31st, none; on 1st November, two cars; on 2nd, 3rd, 4th, 5th, and 6th, none; on the 7th, four; on 8th, none; but he will not say he notified the defendants of the cars being at their disposal.

It thus appears that by contract the defendants stipulated that they could forward goods *as opportunity might offer*: that they were not to be liable after notification to the Grand Trunk Railway of their being prepared to deliver flour to them for further conveyance; and they prove

that forthwith on arrival of the flour at Toronto they gave the Grand Trunk Railway such notification. By their contract they also provided against loss for damage by fire; and that they were not to be bound to send forward by any particular train. It is possible this last stipulation only applies to forwarding by their own line. Therefore as carriers, by the terms of the contract, they were exempt from liability. Their liability as carriers, unless limited by contract, would be for losses by fire not occasioned by inevitable accident, but as carriers they have stipulated against such liability. As warehousemen they would not be liable for loss by fire unless they had been guilty of ordinary negligence. And it was not contended that as warehousemen they had been negligent. And I find that, if they held the goods as warehousemen, there was no evidence of negligence. The case of *Gurvide v. Trent and Mersey Navigation Co.*, 4 T. R. 581, referred to in *Chapman v. Great Western R. W. Co.*, 5 Q. B. D. 278, at p. 280, is not unlike the present case.

The only negligence suggested was, that it was the duty of the defendants to supply or procure from the Grand Trunk Railway cars, into which to tranship within reasonable time. I see no evidence upon which to found such a contention. However, admitting for sake of argument that such was defendant's duty, I am asked to find that they were negligent in the performance of such duty, because they did not tranship before the 9th of November.

On the facts, as above stated, I think I cannot so find. I see no evidence that they were notified after the arrival of the flour, and before the fire, that any cars were at their service for such purpose, I see no evidence that there was not other freight ahead of this awaiting transhipment, or that the defendants neglected any opportunity to tranship.

Even if I had thought that the defendants neglected their duty in not transhipping prior to the 9th of November, it would remain a question as to whether the damages could have been otherwise than nominal, *i. e.*, as to whether the

loss by fire was the damage naturally arising from such negligence. See *Crawford v. Great Western R. W. Co.*, 18 C. P. 510.

I think the plaintiff's case fails, and that the defendants are entitled to judgment, with costs.

Judgment for defendants.

[COMMON PLEAS DIVISION.]

BEGG V. THE CORPORATION OF THE TOWNSHIP OF
SOUTHWOLD.

Drain—By-law to clean and repair—Deepening included in work done—Municipal Act 1883, secs. 570, 589—Assessment, alteration of—Evidence.

A by-law passed for raising the unpaid portion of the expense of cleaning out and repairing a drain, otherwise good on its face, was objected to on the ground that while the resolution and by-law authorizing the the work to be done were for such cleaning and repairing only, the work actually done included deepening, which it was contended could only be done by petition therefor under sec. 570 of the Municipal Act. It appeared that the drain, if deepened, which was not free from doubt, was done accidentally, and not by design.

Under these circumstances, the objection being without merits, and as much inconvenience would ensue if the by-law was quashed, an application therefor was refused; but apart from this—*Quære*, whether under secs. 570, 589, of the Municipal Act, 1883, and 45 Vic. ch. 26, sec. 17, O., the municipality had not power without petition to do such work, including deepening, as might be incidental to maintaining the drain in an efficient state.

A further objection that the assessment was altered without notice, and without affording an opportunity to appeal was disallowed, the evidence failing to establish any such alteration.

ON December 21, 1883, *Lefroy* obtained an order *nisi*, to show cause why a certain by-law of the said township, entitled "By-law 319, to provide for the collection of that portion of the expense of cleaning out and repairing the Cole drain in the township of Southwold, which has not been already paid," should not be quashed in whole or in part, with costs to be paid by the said Municipal Corporation, on the ground that the same is illegal, and was not passed in accordance with the provisions of the statute in in that behalf, inasmuch as the said by-law was not peti-

tioned for by the majority in number of the property owners to be benefited thereby, nor was any proper report of an engineer or provincial land surveyor procured prior to the passing thereof, as by the said statute provided and otherwise; and also, on the ground that the rate thereby imposed is an illegal rate and excessive, and imposed with a view to cover the expense not only of cleaning out and repairing the said drain, as by the said by-law provided, but also of materially deepening, widening, and altering the said drain, whereas no by-law was ever passed or legally passed authorizing any such rate or expenditure by reason of non-compliance with the statutory provisions as aforesaid, and on other grounds.

On February 29, 1884, *Lefroy*, supported the motion.

A. J. Cattunach, contra.

May 20, 1884. ROSE, J.—THIS is a motion for a rule absolute to quash by-law 319, of the township of Southwold, providing for collection of the unpaid portion of the expense of cleaning out and repairing a drain, on the ground that while the resolution of the council directing the work; and the by-law providing for collecting the cost or expense, were for cleaning out and repairing, the work done and paid for included "deepening," which, it is contended, could not have been lawfully done, except on petition, &c., under sec. 570 of the Municipal Act.

The by-law moved against is not otherwise complained of, nor are the steps taken by the council said to be illegal on their face. The applicant relies on the fact that the work actually done and paid for included deepening, and hence that the costs of such deepening cannot be collected, the necessary preliminary steps not having been complied with.

The council, by resolution, on or about the 6th of March, 1882, directed one Bell, a provincial land surveyor, to examine the drain in question, and to have the same cleaned out.

It is said and sworn to by members of the Council that there was no intention or desire on the part of the Council to deepen the drain. The surveyor made the examination, and reported that cleaning and repairing were necessary, and also the expense, and furnished plans. Contracts were let, and the work done.

It is probable that in some places the drain was deepened, although there is much contradiction as to this, as appears by the affidavits filed. The cost was assessed against the lands benefited in the same relative proportions as for the original construction of the drain.

The total cost was \$725. There were voluntary payments by the owners to the extent of \$563, leaving to be collected \$162. Thereupon the by-law complained of was passed, reciting the cleaning, and repairing, and providing for the collection of the \$162.

As I have said, no objection is taken to the by-law on any ground of informality, save as above, and I have not examined it to see whether it complies with, or is in conformity to the statute. I assume it to be so. It was passed in August, 1883. The rule *nisi* was obtained in December of the same year. Begg, the party moving, paid his assessment, \$42, under protest. I assume that the contractors have been paid.

I think the objection without merits; and as the by-law is legal on its face, has been acted upon; as the work has been done and paid for, and much inconvenience would ensue upon the by-law being quashed; as the municipality only intended to have the drain cleaned and repaired, and not deepened, and gave instructions for such work only; and as the deepening, if done, was done accidentally by the surveyor giving levels differing from those of the former plan, and not by design, (see Bell's affidavit,) and as it cannot be said to be free from doubt whether the drain was deepened or not, I do not feel called upon to interfere.

Apart from these considerations, a review of sections 570 and 589 of the Municipal Institutions Act, 1883, and

the 17th sec. of 45 Vic. ch. 26, O. does not leave it at all clear that the municipality had not power, without petition, to do such work, including deepening, as might be incidental to maintaining it in an efficient state.

Suppose, in the original construction, by fraud or negligence of the contractor, a section of the work had not been dug to the requisite depth by, say an inch or two, so that there was no sufficient fall, I would require to give the case much greater consideration than I think necessary for the disposition of this motion, to bring myself to the conclusion that the Council could not, so soon as they discovered such neglect, under sec. 589, requiring them to "preserve, maintain, and keep in repair," have such obstruction removed, and the fall made sufficient. While I do not find it necessary to express an opinion in favour of such view, I wish to be clearly understood as not expressing any opinion that such power does not exist.

I really cannot see what injury either the applicant or the ratepayers have suffered, even if all that is complained of here has been done. Mr. Coad, who makes the measurement for Begg, says that there was not a sufficient fall to a portion of the drain when originally constructed, and that this was remedied at the time the drain was drained out.

The order *nisi* must be discharged with costs.

Mr. Lefroy calls my attention to the second ground of argument taken by him, *i. e.*, that the assessment was illegal under sub-sec. 3 of sec. 587, as it was altered without giving notice, affording opportunity to appeal.

I find no evidence of alteration. The engineer certifies that the assessment is on the basis of the former assessment. This ground therefore fails.

Order nisi discharged.

[COMMON PLEAS DIVISION.]

RE CROOME AND THE MUNICIPAL COUNCIL OF THE CITY OF BRANTFORD.

Tavern and shops—By-law fixing number of licenses—Necessity to state number of inhabitants—Duration of—Re-enactment of statutory provisions—Local matters—Ultra vires—Restraint of trade—Duty in excess of \$200.

Held, that a by-law passed by a city respecting saloon and shop licenses did not require to state the number of inhabitants of the city so as to shew on its face that the number of licenses fixed was within the statutory limit.

A provision in the by-law limited the number of licenses "for the ensuing year beginning on May 1st, 1884, or for any further license year until this by-law is altered or repealed:" *Held*, valid.

A further provision was, being merely a re-enactment of the statute, that the by-law should remain in force until altered or repealed: *Held*, unobjectionable. An objection that the by-law provided for a duty in excess of \$200, which, it was urged, should have been submitted to the electors by separate by-law, was overruled, because in fact the by-law contained no such provision.

Quære, whether several matters, each of which requires the assent of the electors, can be enacted in one by-law, or whether there must be separate by-laws separately submitted to the electors.

The by-law did not state whether it was passed under the Dominion or Local legislation: *Held*, that as it stated no particular power as its basis it must be judicially regarded as emanating from that power which would authorize its passage.

Semble, if the Dominion legislation was in force, then, even if passed under the Ontario Act, under sec. 146 of the Dominion Act which provided, that all local laws passed for regulating or restraining the traffic in liquors were to be in force until 1st May, 1884, it was in force when passed and until repealed by that section, and if so repealed was no longer in force and could not be quashed: If however the Ontario Act was in force then it was valid under that Act; and the sending a certified copy of the by-law to the inspector under sec. 44, sub sec. 2 of the Dominion Act did not disentitle the applicant to invoke the aid of the Ontario Act in its support.

Another provision was, that "Every person receiving a shop license shall confine the business of his shop solely and exclusively to the keeping and selling of liquor:" *Held*, that this was not *ultra vires* and in restraint of trade.

It was also objected that sec. 35 of the License Act of 1884, 47 Vic. ch. 35, O. in effect repealed the by-law as it made the duty more than \$200, and the council had not submitted the question to the electors: *Held*, that if repealed it could not be quashed; but *semble*, that the effect of the section was to add the increased duty to the amount already provided for by the by-laws previously passed unless the council saw fit prior to the 15th April, 1884, to amend the by-law as to the license duty payable thereunder.

No seal was affixed to the by-law, but an impression of the seal was made thereon: *Held*, sufficient.

On May 2nd, 1884, *H. T. Beck* obtained an order *nisi* to quash by-law No. 351, of the City of Brantford, with costs, on the grounds:—

1. That the by-law does not shew that the number of licenses limited by section one is within the number limited by statute.

2. That sections one and two are ambiguous in that they do not shew for what end the by-law is in force.

3. That section two is contrary to the provisions of the statute in providing that the provisions shall remain in force until altered or repealed.

4. That the by-law deals with matters, which on account of the provisions of sections 17, 24, and 32, of the License Act, and section 44 of the Liquor License Act, 1883, cannot be dealt with in one by-law.

5. That the said municipality by complying with the provisions of sub-section 2, of section 44 of the Liquor License Act, 1883, the enactments in sections 1 and 2 of the by-law in effect recognize a concurrent jurisdiction as vested in the Dominion and Ontario Legislatures.

6. That section 3 of the said by-law is *ultra vires* of the said municipality, and in restraint of trade.

7. That the by-law is void for ambiguity, and in that it cannot be ascertained therefrom under what authority it was passed.

8. That the by-law is not under the corporate seal.

The by-law was as follows :—

BY-LAW NO. 351,

Respecting Tavern and Shop Licenses.

The Council of the Corporation of the City of Brantford enacts :—

1. The number of tavern licenses to be issued for the City of Brantford for the ensuing license year, beginning on the first day of May, 1884, or for any future license year until this by-law is altered or repealed, is hereby limited to twenty-one.

2. The number of licenses to be issued for the City of Brantford for the ensuing license year, beginning on the first day of May, 1884, or for any future license year until this by-law is altered or repealed, is hereby limited to five

3. Every person receiving a shop license shall confine the business of his shop solely and exclusively to the keeping and selling of liquor.

4. The following license duties shall be payable, that is to say, for each tavern license the sum of one hundred and eighty dollars; and for each shop license the sum of two hundred dollars.

5. By-law No. 337 is hereby repealed.

Passed on the 18th day of February, 1884.

(Signed) C. J. SCARFE,
Mayor.

(Signed) JAMES WOODYATT,
City Clerk.

No seal was affixed to the by-law, but an impression of the corporate seal was made on the paper.

May 16, 1884. *McKenzie*, Q. C., supported the order.
Hurdy, Q. C., contra.

May 20, 1884. *ROSE*, J.—This is a motion for rule absolute to quash By-law No. 351, of the city of Brantford respecting tavern and shop licenses, on several grounds.

1. The first point of objection taken to the by-law is that the by-law should shew the number of inhabitants in Brantford, to enable one to say by looking at the by-law whether the number fixed, *i. e.*, 21, is within the limit provided for by statute.

I think this is clearly not so. If the applicant contends that the number limited is in excess of the limit provided by statute, he must shew it. See *Gibson v. Corporation of Bruce*, 23 U. C. R. 111; *Lumley* on By-laws, pp. 83-4.

2. That secs. 1 and 2 of the by-law limiting the number for the ensuing license year, beginning on the first day of May, 1884, or for any future license year, until this by-law is altered or repealed" are ambiguous. Sec. 1 is founded on sec. 17, and sec. 2 on sec. 24 of R. S. O. ch. 181.

The argument is, that the language of sec. 17, which is copied into the sections complained of, means that the council may limit the number "for the then ensuing license year, beginning on the 1st of May, 1884, or for any future license year, &c.;" *i. e.*, commencing 1885—or 1886—but not for 1884-5 and 6, &c.

The applicant argues that his contention is supported by reference to sec. 24, which provides for limiting the number of shop licenses, "for the then next ensuing license year, beginning on the first of May," and which words are not followed by "or for any future license year, &c.," as in sec. 17. And he points out the Legislature by ch. 34, sec. 6. Ont. Stats., 1883-4, amends sec. 24 by adding to its first clause the words, "and such last mentioned by-law may be made to come into force on the first day of May, then next ensuing, or on the first day of May of the succeeding year, and any such by-law so hereafter to be passed shall not be repealed during the three years next after the year in which the same shall come into force." Sub-sec. 2 of sec. 24 provides that "such by-law shall remain in force for any future year until repealed." Sec. 24 before amendment, therefore provided that the council might limit the number of shop licenses for the then ensuing year and that the limitation should remain until the by-law was repealed. The amendment by sec. 6 of 1883-4 merely enabled the council to postpone the coming into force until the 1st of May then next ensuing or of the succeeding year, but when it came into force it should remain in force until the by-law was repealed, but should not be repealed within three years. The intent of sec. 24 is thus made unmistakably clear by the amendment, i. e., that the limitation is not for one year only but for succeeding years. This I think is also the intent and meaning of sec. 17, and if necessary "or" in sec. 17 may be read "and." See *Maxwell's Interpretation of Statutes*, 216. I think the applicant by reference to ch. 181, sec. 24, and sec. 6 of 1883-4 removes any difficulty in construing sec. 17. In my opinion this objection fails.

3. The third ground taken is, that sec. 5 of the by-law is contrary to the provisions of the statute, in directing that its provisions shall remain in force until altered or repealed. Such provision is merely stating what is provided by sub-sec. 2 of sec. 24, and is therefore harmless.

It was urged that any by-law that enacted what was

already law by statute or otherwise was useless and improper, and that such by-law should be quashed. No authority was cited for such proposition, or rather authority was cited which does not sustain the ground taken, *i.e.*, *Re Arkell and Corporation of St. Thomas*, 38 U.C.R. 594; *Lumley on By-laws*, p. 85. Mr. Lumley certainly says a by-law "must provide something in *addition* to the general law, and therefore must not simply re-enact it." No doubt a carefully drawn by-law should not so re-enact, but no authority is shewn for the proposition, that this is a ground for quashing a by-law. If municipal by-laws, contain nothing more serious than inadvertent re-enactments of provisions of the municipal statute law, in view of the very great difficulty in drawing by-laws under the various acts, I do not apprehend that much countenance will be given to applications to quash on that ground. I may be allowed to adopt the language of Hagarty, C.J., in *Re Arkell and Corporation of St. Thomas*, at p. 598, and say "I hardly think it dealing fairly with municipalities to subject their by-laws to a scrutiny unreasonably rigid."

4. It was further urged that the by-law provided for several matters, each of which should have been provided for by a separate by-law. One argument was, that ch. 181, sec. 32, provides for submitting to the electors for approval any by-law providing for a duty in excess of \$200, and therefore that any by-law providing for duty should be separate. It is sufficient answer to say that sec. 4 of this by-law does not provide for a duty in excess of \$200, and therefore this reason does not apply.

No authority was cited in support of the contention. I see no principal of legislation opposed to so framing the by-law. Wilson, C.J., in *Re Mackenzie v. Corporation of Brantford*, 4 O. R. 382, at p. 389, does not recognize such a doctrine; and I think *Bailey v. Williamson*, L. R. 8 Q. B. 118, a strong authority against it. If the power to pass by-laws is a delegated power to legislate, then by analogy I think such a by-law not objectionable. I refer to what is generally known in the profession as the "*Omnibus*" Act,

40 Vic. ch. 8, O. A by-law might be framed with clauses as to two or more matters which were to be voted upon, and a separate independent vote might be required upon each, but whether the by-law would be objectionable, or the municipality would be required to so submit the clauses as to enable the electors to express their opinion as to each separately, can be discussed when the question arises.

5. Under this objection the applicant seeks to raise the question as to whether the Ontario or Dominion License Act is *ultra vires*. I am glad that the question does not arise. Had it arisen I should have referred the matter to the full Court, and it would have been necessary to have notified the Attorney General. There is no provision that is not equally well sustainable under either statute, and the law is well settled that if the by-law state no particular power as its basis, it will be judicially regarded as emanating from that power, which would have warranted its passage. See *Dillon on Municipal Corporations*, 3rd ed., sec. 318 and cases there cited.

It was argued that because the council caused a certified copy of such by-law to be sent to the inspector as provided for by sec. 44, sub-sec. 2, of 46 Vic., ch. 30, D., therefore the by-law must be taken to be under the Dominion Act, and the Court must therefore say whether the Dominion Act is in force in Ontario. The Dominion Act, sec. 146, provides that "until the 1st of May, 1884, all the laws of Provincial Legislatures of the Dominion passed for regulating or restraining the traffic in liquors shall be and they are hereby made as valid and effective to all intents and purposes as if enacted by the Parliament of Canada." If the Dominion Act is in force, then when this by-law was enacted the Ontario Act was also in force, and as the by-law complied with its provisions at the time it was passed, if the Ontario Act was repealed by the force of sec. 146, and if by its repeal the by-law was also repealed, then the by-law is not in force and cannot be quashed. If the Dominion Act is not in force then the by-law can be sustained under the provisions of the Ontario Act, and the

sending of the copy of the report to the Inspector under an *ultra vires* Act cannot I think entitle the applicant to successfully contend that the provisions of the Ontario Act cannot be invoked in its support.

6. The ground that sec. 3 is *ultra vires*, and in restraint of trade, is not sustainable. It is in strict compliance with the provisions of sec. 24 of 46 Vic. ch. 181, and sec. 75, D., and also sec. 146 of same Act. See, also, *Hodge v. The Queen*, 9 App. Cas. 117; *Michie and Corporation of Toronto*, 11 C. P. 379.

7. I have already disposed of this ground.

8. This ground also fails. An impression of the seal on the paper is quite sufficient: *Re Bell and Black*, 1 O. R. 125; *Clement v. Donaldson*, 9 U. C. R. 299; *Queen v. Inhabitants St. Paul Covent Garden*, 7 Q. B. 232.

9. It was further argued that sec. 35 of the License Act of 1884, 47 Vic. ch. 35, O., in effect repealed the by-law as it made the duty more than \$200, and the Council had not submitted the question to the rate payers. If it is repealed I cannot quash it, but I do not so read the statute. I think the effect of sec. 32, R. S. O. ch. 181, and 35 of 1884 is to add the \$60 to the amount provided for by by-laws previously passed, unless the Council see fit prior to the 15th of April, 1884, to amend the law lessening the duty payable under the by-law.

I have not found it necessary to consider the objection raised by Mr. Hardy as to the proceedings being directed against the Municipal Council of the city of Brantford instead of the Corporation of the city of Brantford: *Re Sams v. Corporation of Toronto*, 9 U. C. R. 181, was cited in support of the objection; but see the observation of Gwynne, J., in *Brophy v. Corporation of Gananoque*, 26 C. P. 290.

This motion fails. The rule *nisi* will be discharged with costs.

Rule nisi discharged.

[COMMON PLEAS DIVISION.]

REGINA V. THE CORPORATION OF THE COUNTY OF PERTH.

Ways—Roads between townships—Authority of county to purchase from road company—By-law authorizing purchase—Omission of seal and signatures—Power of county to divest itself of road—Liability to repair.

A road ran between several townships in the defendants' county, and was constructed by a joint stock company. In 1866, the defendants purchased the right of the road company in the road at a sheriff's sale under an execution against the company, and received a deed from the sheriff. A by-law had been passed authorizing the purchase, but through inadvertence was not signed or sealed, but the purchase was recognized in subsequent by-laws, and the defendants took possession of and exercised exclusive jurisdiction over the road, expended some \$2,500 in its repair, and continued to deal with it as their own property until 8th June, 1881, when they passed a by-law divesting themselves of the road, after which the defendants ceased to exercise any control over it.

Held, that the defendants were not liable for the non-repair of the road.

Per GALT, J.—The defendants never had any authority over the road under the provisions of the Municipal Act; but they acquired the road, and became responsible therefor under their purchase from the road company, which must be deemed valid, the defendants, under the circumstances, being estopped from denying the validity of the by-law authorizing such purchase. They, however, as they had a right to do, had put an end to their liability by the by-law passed divesting themselves of the road.

Per WILSON, C. J.—The defendants could legally acquire the road by purchase and make themselves responsible for the same under a by-law properly passed for such purpose; and if the defendants are bound by their acts, and are precluded from denying their legal responsibility to maintain the road as a county road so long as they keep it, or if they can be made to perfect the original defective by-law, as to the latter of which propositions he expressed no opinion, they had by the by-law passed therefor, divested themselves of the road and terminated their liability.

Per ROSE, J.—If the defendants had power to purchase the road, and did purchase it, they had power to abandon it, and they had by their by-law exercised such power.

Quære, as to the jurisdiction of a local municipality over a road running within one or more townships or through more than one township.

THIS was a special case, arising out of an indictment against the defendants for non-repair of a road. It was proved that the road was in such a bad state of repair as to justify the conviction so far as mere non-repair was concerned. The questions for the opinion of the Court were: 1st. Whether the defendants were the owners of the road, and liable for the repair of the same? 2d. Whether, on the facts set forth in the special case, the defendants were rightly or wrongly convicted?

The road in question was between the township of Ellice, on the west, and North Easthope, on the east, until it reached the northern boundary of Ellice, and thence

ran along the said boundary, westerly between the townships of Ellice and Mornington, as far as the side-line between Lots 15 and 16, in the township of Mornington, thence northerly along the line between lots 15 and 16, to the concession line between the 6th and 7th concessions of the township of Mornington. The road was originally constructed by an incorporated joint stock company, known as the Stratford Northern Gravel Road Company, duly incorporated.

The defendants, in the year 1864, acquired title to the road in question under a deed from the sheriff, who had seized and sold the same under writs of execution in his hands against the company. From the date of the sheriff's sale up to 8th June, 1881, the defendants took and exercised exclusive jurisdiction and control over the road, and dealt with the same as if its own property. On 8th June, 1881, the defendants passed the following by-law: "Whereas, heretofore, by virtue of certain proceedings of the council and warden of the county of Perth the said county may have assumed some liability for and in respect of the jurisdiction over, and the control, repair, and maintenance of the allowance for road between the townships of Ellice and North Easthope, and between the said township of Ellice and the township of Mornington, known as the Northern Gravel Road; and, whereas, without admitting such liability, the council desires clearly to be discharged and protected of and from the same, and to put an end to such liability, if any. Wherefore, the Municipal Council of the County of Perth enacts as follows: 1st. That all by-laws of this council assuming or purporting to assume the allowance for a road" (describing the above road), "be and the same are hereby repealed. 2nd. That the council hereby divests itself and the corporation of the said county of all jurisdiction (other than that conferred by the statute referring to town lines) and control of and over the said road, and of all liability for, and the maintenance and repair thereof, and expressly disclaims all such jurisdiction, control, and liability."

Since that time the defendants exercised no control over the said road.

During Easter Sittings the case was argued.

Idington, Q. C., for the Crown.

R. Smith, Q. C., contra.

June 2, 1884. GALT, J.—There were a good many questions raised by the learned counsel for the defendants as to whether or not they had ever acquired any right to the said road so as to render them liable for its non-repair, but if we are of opinion the foregoing by-law has the effect intended it will be unnecessary to consider them. It is plain that county councils have no original jurisdiction over any roads in the county, and incur no responsibility respecting them. It is by their own act only such responsibility arises.

By sec. 526, of 46 Vic. ch. 18, O., the Consolidated Municipal Act, 1883, "Every municipal council" (meaning thereby what may be called local municipalities as distinguished from county) "shall have jurisdiction over the original allowances for roads and highways and bridges within the municipality."

By sec. 532 "The county council shall have exclusive jurisdiction over all roads and bridges lying within any township, town, or village of the county, and which the council by by-law assumes with the assent of such township, town, or village municipality as a county road, or bridge, until the by-law has been repealed by the council," &c.

By sec. 533, "Any county council may assume, make, and maintain any township or county boundary line at the expense of the county, or may grant such sum or sums from time to time for the said purpose as they may deem expedient." And by sec. 565, sub-sec. 2, the county council has power to pass by-laws for opening the roads within or between several municipalities.

The foregoing are the provisions principally bearing on this case. The road in question, apart from its having

been a joint stock road, which I will presently consider, is partly within the township of Mornington and partly on the boundaries between the townships of North Easthope and Ellice, and of Ellice and Mornington.

There was no by-law of the defendants assuming this road, nor was there any by-law of the municipalities assenting to the assumption. This may not have been necessary as respects the boundary between the townships of North Easthope and Ellice, and of Ellice and Mornington, but was absolutely necessary as respects that portion of the road lying within the township of Mornington.

It appears to me, therefore, that the defendants never had any authority over this road under the provisions of the Municipal Act, and are not liable to keep it in repair.

It was, however, contended that apart from any action on behalf of the defendants under the Municipal Act, they were the purchasers of the road from the original road company, and were therefore liable. The purchase was made at sheriff's sale on executions against the road company. This distinguishes the case from *Hucking v. Corporation of Perth*, 35 U.C.R. 460, as the sale in that case was made by the municipality of Logan to the defendants, and it was held that although a municipality had the power to sell a road no other municipality could be the purchaser at such sale, but were authorized to purchase from road companies only under sec. 63 of R. S. O. ch. 152,

By sec. 123 of the same Act "The right and interest of any joint stock road company in or to any road, or any part or parts thereof may be sold under execution upon any judgment heretofore or hereafter recovered against such company."

There can be no question that in the present case the defendants purchased the road at sheriff's sale.

It was strongly urged by Mr. Smith that this was not the case, inasmuch as the by-law was not signed nor sealed. It was, however, proved that not only had they paid the purchase money but had accepted a deed from the sheriff, and expended many thousands of dollars in its repair, and

had removed the toll gates ; and moreover their control over the road was referred to in several by-laws subsequently passed, which were unquestionably duly executed. In my opinion, therefore, they are not in a position to dispute their responsibility on this ground.

Assuming then that the defendants were the purchasers, what were their liabilities ? They are, as it appears to me, precisely in the same situation as any other purchaser on writs of execution against a road company at sheriffs' sale. There are special provisions in sec. 152 respecting these sales and the rights and liabilities of such purchasers. And sec. 126 enacts that such purchaser "shall keep the said road, and every portion thereof in a proper state of repair within the meaning of this Act ; and in the case of failure to keep said road in a proper state of repair, within the meaning of this Act, such purchaser shall forfeit his property in such road, or in any part or parts thereof so purchased by him as aforesaid, and the same shall again become vested in the municipality or municipalities."

It is admitted that the road is not in a proper state of repair, and therefore the same is now vested in the municipalities through which it runs.

But I am of the same opinion as that expressed by Hagarty, C. J., in *Hacking v. Corporation of Perth*, 35 U. C. R. 460, at p. 474, in which he says : " I think county Councils had the right by by-law to rescind all previous by-laws for the assumption of this road as a county road."

As I have pointed out there is no original responsibility on the part of a county council to make and maintain any road, but they have power to assume certain roads by by-law, and although nothing is said about repealing such by-law, except in sec. 532, it appears to me such a power must necessarily exist. In that section it is treated by the Legislature as existing, and there can be no reason why they should not have such authority in all cases. It may in the early settlement of a county be expedient for the county council to assist in making and maintaining roads, but it would be very unjust in such cases to hold that

they could not afterwards disclaim all future responsibility and relegate their authority to the municipalities originally liable.

The case is dismissed, and judgment is for the defendants.

WILSON, J.—The questions are :

1. Whether the county council could by law purchase at sheriff's sale under execution the rights of the Stratford Northern Gravel Road Company, the execution debtor ?

2. And if they could, whether the county council had the power afterwards to pass a by-law divesting the county of the road which had been purchased, and throwing the burden of maintaining it thereafter upon the municipalities in the county between which this road lay ?

The R. S. O. ch. 152, sec. 63, enacts that a joint stock road company may sell to any municipal council representing the interests of the county "through or along the boundary of which any such road passes, or on which the work is situate."—[*the road*—but the statute does not say the road ; probably it is an omission, but the sense requires these words to be, and they may be implied], "and such municipality may purchase the stock of such company, or any part of the road."

The case of *Hucking v. Corporation of Perth*, 35 U. C. R. 460, in appeal, decided that a municipality could not purchase a road from another municipality, but by the express language of the statute, in similar language to the section above referred to, could purchase it only from a road company. The purchase now in question was not from a road company. It was a purchase of the rights of road company through the sheriff.

I am inclined to think such a purchase, if free from all other objections, may be supported. I think also a municipality can buy the rights of a road company under a sale at the instance of the mortgagee of the company. There is no substantial difference between buying from the company and buying from a trustee of the company, or from one having the power to sell, even although adversely the rights of the company.

But the section referred to shews the purchase can be made only by the municipality "representing the interests of the locality" through or along which the road extends, or in which the work is situated.

The county does not represent the interests of the locality, that is, of the townships of North Easthope and Ellice, along the boundaries of which the road passes, nor of the township of Mornington through which township it passes.

For some purposes the county does represent the particular locality in or between townships, but these are all carefully specified. Now as to public highways, the county council cannot assume a road *within* a township without the assent of the township: R. S. O. ch. 174, sec. 492, although it may assume a road between townships without the assent of such townships. See secs. 493 to 498.

It is not pretended the county purchased the road with the express assent of Mornington although it was no doubt in fact with the actual implied assent of that township.

The fact of assent being required to constitute a valid assumption by the county of a road within a township shews the county does not represent the interests of that locality, but I do not think it represents the interests of townships between which a road lies, even although it may assume such a road without the assent of such townships.

If *before* the purchase by the county, the county council had passed a by-law to purchase the road, and to assume the same as a county work, I should say the county could become purchasers of the road, for it would then "represent the interests of the locality."

There was such a by-law in this case.

The county council, by resolution 30th June, 1866, authorized the warden to buy the road. The warden did buy it on the 3rd July, 1866, and a conveyance was made by the sheriff to the county council on the 28th of July, 1866. And a by-law [in form], but from oversight never signed or sealed, was passed in December

1866, by the county council assuming the road as a county road, the court having, as is recited in this by-law, legally acquired the said road.

The county has, since its purchase, expended upwards of \$25,000 in maintaining and repairing the road.

The county council had not formally passed a by-law to purchase the road, or to assume it; and unless the by-law can now be directed to be perfected by adding the formalities of seal and signature to it, the sale was not legally made, assuming the county could by a valid by-law passed for the purpose have legally made such a purchase.

Can the county council now, having acted upon such purchase as legally made, and upon such imperfect by-law as perfectly passed, and having ratified it, so far as that can be done by later by-laws, resolutions, and expenditures passed and made upon the road as a county work, and for so long a time as, from the time of the purchase in July, 1866, to and until the passing of the by-law on the 8th of June, 1881, abandoning the further assumption of the road as a county road, be now compelled to complete the by-law by the necessary formality of the seal and signature?

If so, the road did become by the purchase a county road. If not, the road was never legally purchased.

But it will be unnecessary to consider that point, if, assuming the by-law to have been properly passed, and within the power of the council to pass it, the council could rightfully abandon the further control of the road as a county work. And I am of opinion, that as the county council could acquire the road only by assuming it under the R. S. O. ch. 174, sec. 492, and could not acquire it under ch. 152, sec. 63, without such assumption, because the county did not "represent the interests of the locality," it had the right to abandon such road as a county road by by-law passed for that purpose, and to throw the burden of maintaining it upon the original bodies who were at law bound to maintain it, unless the power of repeal is confined to roads "within a township," and which

roads can be assumed only "with the assent of the township" under sec. 492.

It may be the power of repeal under that section is expressly given to shew that although the assumption of the road can be made only with the consent of the township, the by-law of the county repealing such assumption may be passed without the consent of the township, and that the general right of repeal may be exercised by the county in all cases of assumption of roads, although *between* townships, as in other general cases. The repeal might perhaps be prohibited if the effect were to cast upon the local municipality, a greater and more unreasonable burden than the municipality would have been subjected to if the road had not been assumed. But that does not appear to be the case here, for the local bodies will not require to do more than to maintain such a road as they would have had to do if it had not been assumed. The local municipalities may alter their roads as they please from one kind to another; and in like manner if they receive a plank road, by the county giving up their future assumption of it, they may macadamize it, or reduce it to a roadway of the original soil. I see no objection to the county giving up as a county road the line of way in question by a repeal of any assumption of it they may have heretofore exercised by by-law, resolution or otherwise.

And therefore if the county are bound by their acts and are precluded from denying their legal responsibility to maintain the road as a county road, so long as they keep it, or if they can be made to perfect the original defective by-law, the latter of which propositions I express no opinion upon, I am of opinion they can abandon the road as a county work and withdraw from their further assumption of it and cast the burden of its future maintenance upon the local municipalities, and in my opinion they have done so.

ROSE, J.—The only portion of the road in question in this matter is so much as lies between the townships of Ellice and North Easthope, and Ellice and Mornington.

So much as lies wholly within the township of Mornington has been assumed by that township.

If the county had no power to purchase the road in question under the General Road Companies' Act, or to assume it under the Municipal Act, or by reason of any informality did not in law effect its purpose to purchase or assume the road, then it never became the property of the county, unless by reason of its extending into Mornington it became a road "running within one or more townships," or more accurately "within more than one township," and thus subject to the jurisdiction of the county under the provisions of sub-sec. 2, sec. 565, Municipal Institutions' Act, 1883, (sub-sec. 3, sec. 342, C. S. U. C. ch. 54) which is the only section of the Municipal Act referring to roads running "within one or more townships." As by that section power to open, make, preserve improve, repair, widen, alter, divert, and stop up such roads is given to the company, and as no power is given by any other section of the Act over such a road to a local municipality, it may be that the jurisdiction of the county is assumed by the Legislature as to such roads, and that the local municipalities have no power over roads running within one or more townships, or more than one township, or through more than one township.

This may not refer to roads formed by abutting concession roads, which can hardly be said to run within more than one township, but are formed of several roads lying each within its own township, and so coming within the provisions of sec. 550.

If it be found that this is the proper construction of sub-sec. 2 sec. 565, it will be clear that a township could not close up a section of a road running from another township through its own territory. The roads to which such section may be held to apply, may be roads running diagonally across more than one township, either trespass roads, roads opened by the county, or opened by private owners, and dedicated to and accepted by the general public

I think I may avoid expressing an opinion on this question in this case, for as above stated the section of the road to be dealt with is only that portion running between townships and is provided for by sec. 538, under which it would certainly not belong to the county. If the county had power to purchase and did in fact and in law purchase the road under the General Road Companies Act, R. S. O. ch. 152, then, under sec. 80, it would, in my opinion, have the power to abandon it, and it did by by-law exercise such power. The notice required by sub-sec. 3. sec. 80, became unnecessary as the county could not be required to give notice to itself.

If the county assumed the road under the provisions of sec. 533 of the Municipal Institutions Act of 1883, (sec 493, R. S. O. ch. 174) then under the authority of *Hacking v. Corporation of Perth*, 35 U. C. R. 460, it could repeal the by-law under which it so assumed it, and it has in fact passed such repealing by-law.

I therefore concur in thinking that the case must be dismissed.

Case dismissed.

[COMMON PLEAS DIVISION]

NORTH V. FISHER.

Foreign judgment—Action on—Statute of Limitations—Lex fori.

To an action on a foreign judgment recovered in the Supreme Court of New York, the defendant set up as a defence that the cause of action accrued more than six years before the commencement thereof.

Held, on demurrer, a good defence, for under our law the foreign judgment is only deemed to constitute a simple contract debt, and the period of limitation is governed by the *lex fori*, and not by the *lex loci contractus*.

THIS was an action on a foreign judgment, commenced on the 24th March, 1884.

The statement of claim alleged that on the twenty-fourth day of December, 1874, in the Supreme Court, County of Albany, in, and for the State of New York, one of the United States of America, in an action then depending in the said Court, at the suit of the now plaintiff, Charles F. North, against the now defendant, Horace Fisher, by a judgment of the said Court, then having lawful jurisdiction and authority in that behalf, the said plaintiff recovered against the defendant, for a debt due from the defendant to the plaintiff for goods sold and delivered by the plaintiff to the defendant, the sum of \$1,493.57, and the further sum of \$16.94, for costs of suit, which sums of money, amounting in all to \$1,510.51, the defendant was by the said Court, adjudged and ordered to pay to the plaintiff. It was then alleged that \$274 20 was realised on account of said judgment, leaving still due \$1,236.31, and interest.

The third paragraph of the statement of defence was, that the alleged cause of action accrued more than six years before the commencement of this action.

To this the plaintiff demurred on the ground that it is not shewn that by the law of the State of New York, where the judgment sued on was obtained and the cause of action arose, the lapse of six years is a bar to this action.

On June 3, 1884, the demurrer was argued.

Carscallen (of Hamilton,) in support of demurrer.

Fitzgerald (of Hamilton,) contra.

June 13, 1884. ROSE, J.—This is a demurrer to a plea of the Statute of Limitations, to an action on a foreign judgment.

Mr. Carscallen stated that he demurred, relying upon the decision in *Fowler v. Vail*, 27 C. P. 417.

It will be necessary therefore to examine the pleadings in each case. The statement of claim herein sets out a judgment obtained on the 24th December, 1874, recovered in the Supreme Court, County of Albany, State of New York. This action was commenced on the 24th of March, 1884. It does not appear from the pleadings where the parties were residing at the time of bringing either action. The statement of claim merely alleges that the Court had lawful jurisdiction and authority in that behalf.

In *Fowler v. Vail* the action was brought in the year 1876, on a judgment recovered in the State of New York, on the 18th of March, 1872. This judgment was recovered in an action brought by Maria P. Beecher, as administratrix of William A. Beecher, on a judgment recovered by William A. Beecher more than twenty years before the commencement of the action on such judgment. The defendant pleaded such facts, setting up as a bar to the action on the judgment of 1872, that such judgment was recovered on a cause of action which did not accrue within twenty years before the commencement of the suit. It will thus appear that in the case in question, the plea sets up the Statute of Limitations in force in Ontario, and in *Fowler v. Vail* the Statute of Limitations in force in New York State where the action was commenced on the original judgment.

In the case in question the judgment sued upon was recovered more than six years prior to action thereon in Ontario. In *Fowler v. Vail*, less than four years.

In *Fowler v. Vail*, the decision was that the plea was bad, as not averring what the foreign law of limitations was, such law being a fact which, if relied upon, must be

set out in the pleadings. As the defendant in this case is not relying on the foreign law, it is manifest he could not set it out, and therefore *Fowler v. Vail*, is not applicable. If therefore the plea can be a good answer to an action on a foreign judgment more than six years old, it is not on the facts set out on this record bad in law.

It is undoubted law, that foreign judgments are only simple contract debts in this country, to which the former plea of never indebted was applicable. See judgment of Wilson, J., in *Barned's Banking Co. v. Reynolds*, 36 U. C. R. 256, at p. 288-9. The reasoning in that case shews that the bar to an action on judgment of an Indian Court in Ontario is six and not twenty years. Prescription of suit or limitation of action has been long settled by the Courts of England to be part of the *lex fori* only: *Harris v. Quine*, L. R. 4 Q. B. 653 "The question is one of procedure, and as such must be determined by the law of the country where the action is brought:" per Lopes, J., in *Alliance Bank of Simla v. Carey*, 5 C. P. D. 429, at p. 430. That "the time of the limitation of the action * * is governed by the law of the country where the action is brought, and not by *lex loci contractus*, is evident from many authorities:" per Tyndal, C. J. in *Huber v. Steiner*, 2 Bing. N. C. 202, 211.

In the *British Linen Co. v. Drummond*, 10 B. & C. 903, where the cases are collected to that date, Lord Tenterden, C. J., at p. 912, says: "The party suing and seeking to avail himself of the law of a particular country, must take that law as he finds it."

It is clear therefore that the plea is good in law, and the demurrer must be over-ruled.

The plaintiff can consider whether he can reply as in *Huber v. Steiner*, or set up any other facts in answer to the plea.

For such purpose I give leave to amend within a fortnight. Costs of this demurrer, and of any amendment to be costs in the cause to the defendant, in any event of the cause.

Judgment accordingly.

[COMMON PLEAS DIVISION.]

THE FEDERAL BANK V. HOPE.

Motion for immediate judgment—Rule 324—Promissory note—Agreement to renew—Death of maker.

During the currency of a promissory note it was agreed between the indorsee and indorser that the note should be renewed at maturity, and from time to time on payment of a named sum, "if the renewal notes are continued in the same firm or names as at present." Before the maturity of the note the maker died. After its maturity in an action on the note against the endorser the defendant set up such agreement as a defence, and alleged that he duly offered to perform it so far as lay in his power by leaving the said note and liability of the maker and giving his note in renewal as agreed as collateral to the said note, which tender the plaintiff refused to accept, and which the defendant is at all times ready and willing to carry out.

A motion for immediate judgment under Rule 324 was dismissed, the judge refusing to decide as to the legality of the defence on such motion.

STATEMENT of claim on a promissory note, dated 7th January, 1884, for \$1,750, payable three months after date, made by one Mary N. Hope, and endorsed by the defendant, alleging that the note became payable on the 10th April, 1884, and was dishonoured.

As a defence the defendant set up that during the currency of the said note a settlement was effected between the firm of Hope & Temple of some transactions between them, and that as a part of such settlement it was agreed between the plaintiffs and defendant that the plaintiffs should renew the said note for a term of three months after the same fell due without any payment, and renew each successive three months on payment of the sum of \$125, or until the whole amount should be paid in this way, the defendant to permit the same parties' names to remain on the renewal note or notes as were then on the note in question, it being well understood between the parties that the defendant could not otherwise pay the said note, and being intended to give him the requisite time in which to arrange his affairs and enable him to pay the sum specified, the plaintiffs merely desiring their position should not be altered in respect of the parties names on the notes, and it being implicitly under-

stood that in case of the death of said Mary N. Hope, his liability merely should be retained by the bank.

The fourth paragraph alleged that prior to the falling due of the said note the said Mary N. Hope departed this life, and the defendant duly offered to perform the agreement, so far as lay within his power, by leaving the said note and liability of said Mary N. Hope, and giving his own note in renewal as agreed as collateral to the said note, which tender the plaintiffs refused to accept, and which the defendant is at all times ready and willing to carry out: that the settlement was of great advantage and importance to the plaintiffs in their business.

The replication so far as material was as follows: It denied that the agreement was as alleged by the defendant, but consisted of two separate agreements, one with the said firm and the other with the defendant specially relating to the note in question, which agreement was as follows:

TORONTO, February 29th, 1884.

"William Hope, Esq., City,

"Dear sir:

"It is understood and agreed that your debt to the Federal Bank represented by a note now current for \$1,750 is to be renewed in full for three months at maturity, and to be renewed from three months to three months on payment of \$125 and discount at 7 per cent. until fully paid if the renewal notes are continued in the same form or names as at present.

"Yours truly,

"H. S. STRATHY,

"General Manager."

That under and by virtue of the secondly mentioned part or agreement the plaintiffs were not obliged to renew the note unless Mary N. Hope became a party to the renewals, and upon her death and the maturity of the note it became the duty of the defendant to pay the same, which he failed to do.

On motion to enter immediate judgment under Rule 324, it was urged that the defence thus set up would not constitute any legal defence to the action,

On June 27th, 1884, *Cattanach* supported the motion, and referred to *Chitty* on Contracts, 11th Amer. ed., p. 1073 and notes.

Nesbitt, contra, referred to *Howell v. Coupland*, L. R. 1 Q. B. D. 258; *Appleby v. Myers*, L. R. 2 C. P. 651; *Boswell v. Sutherland*, 32 C. P. 131, 8 App. R. 233; *Boast v. Firth*, L. R. 4 C. P. 1; *Oates v. Supreme Court of Forresters*, 4 O. R. 535.

June 30, 1884. ROSE, J.—This is an application for immediate judgment under Rule 324.

The action is on a promissory note. There is an issue of fact upon the pleadings, but it is apparent the real defence is, that the defendant is entitled to have the note renewed. There was an agreement to renew "from three months to three months, upon payment of \$125, and discount of seven per cent. until fully paid, if the renewal notes are continued in the same form or names as at present."

As a matter of fact the form of the note was Mary N. Hope, maker, and the defendant, payee and endorser.

Since the note sued upon was made the maker has died.

The defendant, in paragraph 4 of the statement of defence, alleges that he "duly offered to perform the agreement, so far as lay within his power, by leaving the said note and liability of said Mary N. Hope, and giving his own note in renewal as agreed, as collateral to the said note, which tender the plaintiff refused to accept, and which the defendant is at all times ready and willing to carry out." If this means that the assent of the personal representatives of the maker will be obtained, so that the bank will not lose their claim upon her estate, it is manifest that in substance the defendant is offering to perform his agreement. It may be, as a matter of law, this defence cannot be sustained. No case exactly bearing upon the question has been cited. It is stated that an adverse decision means ruin to the defendant, and counsel assert that the defence is advised, and will be stoutly maintained.

The defendant objects that the plaintiffs are not entitled to have the question decided in this manner, and that the question should be raised by demurrer; but if it were apparent that the statement of defence contained no answer in law, *i. e.*, was clearly bad, the Court, no doubt, could give judgment without a formal demurrer, all parties being before the Court, and no issue in fact remaining to be disposed of.

If, however, I formed an opinion against the defendant, I should feel it my duty to stay proceedings, until the sittings of the Divisional Court, to enable the opinion of the Court to be taken, if there be no authority on the point. None was cited, and I have not thought it necessary to make careful search for any, as I have come to the conclusion that it will not be conducive to the ends of justice that immediate judgment be granted to plaintiffs on this record.

The motion must be refused, with costs to be costs in the cause.

Motion refused.

[COMMON PLEAS DIVISION.]

WALTON V. SIMPSON.

Contract—Fraud—Waiver—Failure of jury to answer questions—New trial.

A contract induced by fraud is not void but voidable merely at the option of the party affected or prejudiced thereby; and when the party affected adopts the contract induced by the fraud, the discovery of a new incident of the fraud does not revive the right to repudiate.

In this case there being no finding by the jury that the defendant had knowledge of, and had waived the fraud, a new trial was directed,

THIS was an action tried before Wilson, C J., and a jury at Toronto at the Spring Assizes of 1884.

The action was brought by the plaintiff against the defendant to recover damages for breach of an agreement in writing signed by the defendant, dated 30th April, 1883, whereby she was to become the plaintiff's agent at Guelph for the sale of McCall's New York Bazaar Glove-fitting Patterns, and requested the plaintiff to deliver to the Grand Trunk Railway Company at Toronto, addressed to her at Guelph, a stock of Bazaar patterns net \$300 as per terms of agreement to be paid at Toronto, by notes at two, five, and eight months from date of invoice at seven per cent. interest until paid, payable only at the plaintiff's office. The agreement then provided that the defendant would not cancel the offer, would not recognize any cancellation, and then went on: "Notes to be endorsed by my (defendant's) sister."

The plaintiff shipped the patterns, as directed, to the defendant's address at Guelph, and on the 3rd May, wrote to the defendant inclosing an invoice of the patterns shipped, and notes drawn in favour of the plaintiff at two, five, and eight months, with a request to the defendant to complete and get her sister to endorse and return the notes on receipt of the goods on the 7th May, 1883.

The defendant replied that the patterns had arrived that morning, but on being counted were found to be short, and a statement of the missing patterns was given, amounting

in value to \$27.75, which she requested him to correct before she would complete the notes and return them. The missing patterns were afterwards supplied.

On the 12th May she again wrote to the plaintiff, that on more mature consideration she positively declined to become the plaintiff's agent for the Bazaar patterns, and returned, carriage paid, the goods sent her, adding: "Your persuasive arguments to induce me to entertain the idea overruled my better judgment for the moment. I am the best judge of my own business, and was convinced and am now, that instead of being a benefit to my present trade the agency will prove a serious injury, so that no inducement you can offer would make me undertake the agency."

The plaintiff replied on the 14th May, requiring the defendant to carry out her agreement, and his letter wound up: "If you have returned goods I cannot accept them, and will simply have to place the matter in my solicitor's hands in the usual way, for as you refuse to give notes the matter must be settled for cash. I wait a day or so for your reply before doing so, and trust that you will see that it is impossible for me to sustain such a loss."

A day or two after this letter was written the defendant came to Toronto and had an interview with the plaintiff, wishing him to take back the agency and goods which he declined to do unless his former agents Messrs. Williamson & Co., would continue the agency.

In three or four weeks she returned with her sister, and after some conversation with the agent Kidd, with whom she made the agreement, it was arranged she was to continue the agency, take back the goods, and give notes without her sister's endorsement, and the notes were to bear a later date, the plaintiff in his evidence said the 15th June, about which time the goods which remained with the Grand Trunk Railway Company after the defendant had sent them back would be returned to the defendant.

The defendant in her evidence in answer to the question: "While you were at Toronto you made up your mind to keep the patterns?" said: "Mr. Walton would not let me

do any othe way. I did not want to go to Court, and I told him I wanted to settle, and not have him a loser. I was willing to sacrifice a good deal to settle."

After this interview, in consequence of some mistake of the railway company, the goods did not again reach the defendant as soon as she expected, and she again wrote the plaintiff by post card on 25th June: "I have not received the patterns as yet, although I sent for them, therefore will not remit notes complete until I get them."

On the 29th June, her brother-in-law wrote in her name and at her request, to the plaintiff: "To-day the G. T. R. Company offered for delivery at my store a box said to contain patterns, and I refused to take delivery of it, and it is now lying at the G. T. R. depot subject to your order. The reason why I refused this box is, it is an entirely different box from the one which I returned you." After complaining of the conduct of the plaintiff and Kidd his agent the letter wound up with: "And if you think I am to be played with you are greatly mistaken, and I here state that unless you act more honourable in this matter and do things in a business-like manner, as a business man should do, I will refuse to take the patterns at all, and as I have right on my side I have matters pretty well in hand, and can beat you in any Court of law. Waiting your immediate reply. Yours truly, H. L. SIMPSON."

On the 30th June, the plaintiff wrote to defendant, without noticing her letter of the 29th: "I presume you will have the goods before this as the Grand Trunk authorities informed me they would ship the goods back. Please send in the notes as requested before."

On the 7th July, defendant, by her brother-in-law Howie, again wrote the plaintiff: "As I have received no reply from you in answer to my letter of June the 29th, in reference to the patterns, I take this opportunity of informing you that I now refuse to take them on any terms after the manner in which I have been treated."

On the 9th July, the plaintiff wrote acknowledging receipt of the defendant's letter of the 7th, and intimated he

had instructed his solicitors to communicate with defendants.

To this letter Mr. Akers, defendant's solicitor, replied on the 11th July, intimating, among other things, that he was instructed to accept service on the defendant's behalf. The letter is stated to be written without prejudice.

After some further correspondence the plaintiff commenced this action on the 26th July.

The plaintiff's statement of claim alleged in effect that by agreement signed by the defendant and dated 30th April, 1883, the defendant agreed with the plaintiff for the sale and delivery by him to the defendant of a stock of Bazaar patterns for the sum of \$300, to be paid by the defendant to the plaintiff at his office in Toronto, by notes of the defendant payable to the order of and endorsed by her sister at two, five, and eight months from date of invoice, with interest at seven per cent. till paid: that the goods were duly delivered by the plaintiff to the defendant. And all conditions were fulfilled, and all things happened, and all times elapsed necessary to enable the plaintiff to be paid for the said goods, but the defendant did not pay for the goods by delivering the said notes as aforesaid. And he claimed \$350 for damages for breach of the said agreement.

The defendant in her statement of defence in the second paragraph, denied that she made the agreement as alleged.

In the third paragraph she alleged that the plaintiff by his agent A. E. Kidd, obtained the signature of the defendant to the agreement by fraudulent misrepresentation.

4. That the contract was in writing, and that the plaintiff afterwards, and while it was in the plaintiff's possession, it was rendered void by being materially altered without the defendant's consent or knowledge by adding the words "notes to be endorsed by my sister;" and she further alleged she did not agree to pay interest.

5. That the plaintiff did not deliver to the defendant the stock of Bazaar patterns agreed to be furnished, but tendered to her a different stock, a greater part of which was old and unfashionable, and other parts of which were

second-hand furnished by the plaintiff from J. D. Williamson & Co., at a reduced price, and the stock so tendered did not agree with the invoice sent to her, and she refused to accept, and returned the same to the plaintiff.

6. That at the time the agreement was signed by her it was not a complete agreement, but signed merely to be submitted to the plaintiff, and he was to advise the defendant whether he would grant certain terms to her then mentioned ; she was then to decide whether she would become the agent of the plaintiff, and the said agreement was not to take effect until she so decided after hearing from the plaintiff as to said terms, but he never advised her, and before he did so she withdrew from the offer and the agreement was never completed.

The learned Chief Justice submitted questions to the jury, which with the jury's answers, were as follows :

1. Did the defendant sign the writing produced as the contract between the parties ? Answer—Yes.

2. Were the words objected to by the defendant, " to be endorsed by my sister," in the writing when the defendant signed it ? Answer—Yes.

3. Was the writing signed by the defendant upon the terms—1. There was to be no endorser. 2. That the terms of payment were, no immediate cash payment, but notes to be taken at two, five and eight months ; and 3, that the defendant should have the right to exchange the patterns, and that until the plaintiffs agreed to these terms, the contract was not to be binding ?

The jury did not answer this question.

4. Was the contract obtained by the plaintiff upon false representations made by Kidd to the defendant ? Answer—Yes.

(a) Did Kidd represent to the defendant that Mrs. Wright had made \$400 profit on her pattern business in the previous year ? Answer—Yes. Or was it that Mrs. Wright said she had sold \$400 worth of patterns in the previous year ? Answer—Yes, \$400 profit.

(b) Did Kidd falsely represent to the defendant that

Mrs. Wright would take the plaintiff's pattern agency? Answer—Yes.

(c) Did Kidd falsely represent to the defendant that Williamson wanted to give up their agency only because it hurt their dress-making business? Answer—No.

(d) Did Kidd falsely represent to the defendant that Williamson had done well by their agency? Answer—Yes.

(e) Did Kidd falsely represent to the defendant that one of the plaintiff's agents had given up all his other business and had gone entirely into the pattern business as he had made that business such a success? Answer—Yes.

5. Did the defendant receive and accept the box of patterns sent to her about the 4th May, and the patterns sent her shortly after by post under the agreement between the parties? Answer—Yes.

6. Did the plaintiff (if the defendant received the patterns) ever receive and accept the patterns back? Answer—No.

7. Did the defendant agree with the plaintiff at their second interview in Toronto to take the patterns and agency and give notes at two, five, and eight months from that date? Answer—Yes.

8. Were the false representations said to have been made by Kidd at the time of the contract of the 30th April, still continuing false representations at the time of the arrangement made at the second interview of the defendant with the plaintiff in June, 1883? Answer—Yes.

The learned Chief Justice upon these answers entered the finding as follows on the copy of pleadings: "The verdict is as follows: That the statement of claim is proved: that the second, fourth, fifth, and sixth paragraphs of the statement of defence are not proved, and that the third paragraph of the statement of defence is proved, and I give judgment accordingly, with costs of the cause to the defendant, and the costs of the issues found against the defendant, or for the plaintiff, to the plaintiff.

The defendant in her evidence shewed that at the time of the interview with the plaintiff at Toronto, in

June, she was aware that the representation made by plaintiff's agent, Kidd, that Mrs. Wright had made \$400 profit out of the sale of patterns, was not true.

During Easter Sittings, May 27, 1884, *Bethune*, Q. C., on behalf of the plaintiff, obtained an order *nisi* directing the defendant to shew cause why the findings of the jury on the defence of fraud, and the judgment rendered for the defendant thereon, should not be set aside and a new trial had between the parties on the issues as to fraud, on the ground that the said findings are against law and evidence, and the weight of evidence, and on the ground that there was no rescission of the contract.

During the same sittings, June 4, 1884, *Bethune*, Q. C., supported the order *nisi*. The evidence does not support the pleadings on the allegations of fraud. But if there had been false representations and fraud in the inception of the contract, the defendant, with knowledge of the fraud, agreed to affirm the contract, and having made her election not to avoid it, she could not now withdraw from the election. A contract founded on fraud is not absolutely void, but voidable only at the option of the party to it affected by the alleged fraud; and there was no evidence to sustain the finding of the jury on the eighth question submitted to them, and if there was, it was unimportant as the answer to the seventh question, that the defendant, at the second interview between the defendant and the plaintiff at Toronto in June, which was after the defendant had knowledge of the alleged misrepresentation, agreed to take the patterns and agency, prevented the defendant from setting up such original misrepresentations against the validity of the contract. He referred in support of this contention to *Clough v. London and North-Western R. W. Co.*, L. R. 7 Ex. 26, 34; *Urquhart v. Macpherson*, L. R. 3 App. 831, 838; *Kerr on Fraud*, 2nd ed., 382, and *Campbell v. Fleming*, 1 A. & E. 40, 42.

Akers, contra. The false representations were clearly made out, and the plaintiff failed to return the goods as

agreed upon at the second interview in Toronto, in June. There was no acceptance of the goods. When first sent to Guelph the quantity was not complete, and the defendant had a right to reject them. The evidence did not establish that the defendant knew of the misrepresentations when she agreed to take back the goods and take the agency at the interview in Toronto. She certainly had no knowledge at the time of the falsity of all the misrepresentations by which she was induced to enter into the contract: *Star Kidney Pad Co. v. Greenwood*, recently decided in the Queen's Bench Division, not yet reported (a).

Bethune, Q. C., in reply. If the defendant, with knowledge of a fraudulent representation affecting the validity of the contract, chose to adopt it, she cannot afterwards by reason of discovering the falsity of some other representation, go back from her election and set up the fraud again: *Campbell v. Fleming*, 1 A. & E. 40, 42.

June 26, 1884. CAMERON, C. J.—The answers given by the jury to all the questions except to the fourth and its subdivisions, and the eighth, are in favour of the plaintiff, and I regret in a matter where so little is involved, that the questions and answers are not sufficient to determine which of the parties is in law entitled to succeed.

The finding on the fourth question, though it establishes that the contract was obtained from the defendant by false representations made by the plaintiff's agent, Kidd, is unimportant if the defendant, after knowledge that those representations were false and misrepresentations, chose to adopt and accept the contract. The evidence, I think, shews undoubtedly that she did, but there is no finding by the jury that she did or did not. The eighth question is not one that presents that, so that it can be said they considered or intended to find upon it.

It may be that the learned Chief Justice had the necessity for such a finding in his mind when he submitted it, but, if so, it is unfortunate the question was not differently and

(a) Since reported in 5 O. R. 28.

more aptly framed to obtain the opinion of the jury as to whether or not at the interview between the plaintiff and the defendant at Toronto, in June, the defendant had knowledge that the representations, or some of them, made by Kidd, were untrue, for, if she had, then, upon the authorities cited by Mr. Bethune, she could not after then affirming the contract as the jury by their answer to the seventh question find she did, be heard to assert it was obtained from her by fraud.

To say as the jury did by their answer to the eighth question, that at the interview in June the false representations made on the 30th of April were continuing false representations, was no more than to say that which was false in April was not made true by anything happening in the meantime, and is a very different thing from determining that the defendant then had knowledge that they were false and yet chose to accept them with such knowledge as true, and act upon them.

The law seems to be clear that a contract induced by fraud is not void, but voidable merely at the option of the party affected or prejudiced by the fraud.

In *Clough v. London and North-Western R. W. Co.*, L. R. 7 Eq. 26, Mellor, J., delivering the judgment of the Exchequer Chamber, at p. 34 of the report, says: "And we further agree that the contract continues valid till the party defrauded has determined his election by avoiding it. And, as is stated in Com. Dig. Election, C. 2. if a man once determines his election it shall be determined forever; and as is also stated in Com. Dig. Election, C. 1, the determination of a man's election shall be made by express words, or by act. And consequently we agree with what seems to be the opinion of all the Judges below, that if it can be shewn the London Piano Forte Company have at any time after knowledge of the fraud, either by express words or by unequivocal acts, affirmed the contract, their election has been determined for ever. But we differ from them in this that we think the party defrauded may keep the question open so long as he does nothing to affirm the contract."

This opinion would seem to preclude the defendant from now disputing the validity of the contract proved if she had knowledge of the alleged fraud, and yet agreed to accept the goods and take the agency mentioned in the agreement.

But it was urged on her behalf that at that time she had not a knowledge of the full extent of the misrepresentation. This would not seem to avail anything, as in *Campbell v. Fleming*, 1 A. & E. 40 at p. 42, the language of Lord Denman, C.J., Littledale and Patteson, J.J., shews that once adopting a contract induced by fraud, the discovery of some additional fraud does not entitle the defrauded party to rescind it.

Lord Denman said: "There is no authority for saying that a person must know all the incidents of a fraud, before he deprives himself of the right of rescinding.

Patteson, J., in effect stated that the discovery of a new incident in the fraud could only be considered as strengthening the evidence of the original fraud, and could not revive the right of repudiation that had once been waived.

I am therefore of opinion that the case should go down to a new trial for the purpose of getting the opinion of the jury upon the point indicated, and to find the amount the plaintiff is entitled to should the jury be of opinion that the defendant had knowledge that Kidd's representations were fraudulent misrepresentations at the time she agreed to take the goods back.

GALT, J., concurred.

ROSE, J., having been engaged in the case while at the bar, took no part in the judgment.

Rule absolute for new trial.

[CHANCERY DIVISION.]

CLARKE v. UNION FIRE INSURANCE COMPANY.

RE EXPORT LUMBER COMPANY.

Insurance company—Blank policy issued in a foreign country—Where contract made—Lex loci contractus.

The defendants signed and sealed a number of policies in blank, and sent them to an agent in New York to be filled up and issued as insurances were effected. A., their agent, there filled up one for a risk of \$2,500 on a lumber yard, a risk greater than *extra hazardous*, although he had been instructed not to take any extra hazardous risk for more than \$1,500. He issued the policy without receiving the payment of the premium, although a condition was indorsed on it that no insurance proposed to the company was to be considered in force until the premium should be paid in cash. The policy was issued on the 8th August. The fire occurred on the 10th August. A cheque for the premium was sent to the company on the 11th August, which was immediately returned, and the risk repudiated. Under the winding up proceedings of the company it was attempted to prove a claim for the loss in the Master's office, when it was contended that the law of the state of New York, where the policy was issued, governed the contract, and under that law the agent had power to waive the payment of the premium. The Master disallowed the claim, holding that the law of Ontario governed the contract. On an appeal from the Master's certificate. It was

Held, that the Master was right. That the law of Ontario governed, as the place where the policy was signed and sealed was the place where the contract was made.

THIS was an appeal by the Export Lumber Company of New York from a certificate of the Master in Ordinary.

The Union Fire Insurance Company was being wound up in the Master's office, under an order made in a suit of *Clarke v. The Union Fire Insurance Co.*, and the claimants the Export Lumber Co. had attempted to prove a claim before the Master, which he had disallowed.

It appeared that the defendants had signed and sealed policies in blank and sent them to one Anderson, their agent in New York, to be filled up and issued by him, as applications were made and accepted, and accompanying the policies they sent a letter stating the conditions on which the policies were to be issued, two of which were that no risk was to be taken for a larger sum than \$2,500, and no extra hazardous risk was to be taken for a larger sum than \$1,500.

Anderson insured the claimants' lumber yard, which appeared by the evidence to be more than an extra hazardous

risk for the sum of \$2,500, and at a rate of premium that had previously been refused by the defendants, and issued the policy without receiving the premium. The policy when issued had the following condition endorsed thereon: "No insurance proposed to this company is to be considered in force until the premium be actually paid in cash." The policy was delivered by Anderson to one Anthony, the claimants' agent, on August 8th, 1880; the fire occurred on the 10th, and a cheque for the premium payable to the order of the defendant company was paid to Anderson on the 11th who then forwarded it to the company by whom it was at once returned and the risk repudiated.

This insurance was one of a great many effected with different companies, and the amount assessable against the defendants was fixed by a committee, appointed for the purpose, at \$2,076.73, and on an attempt being made to prove a claim for this amount it was resisted on several grounds, and among others, because the defendant company was incorporated under an Act of the Provincial Legislature of Ontario, and that any business done outside of Ontario was *ultra vires*, and that the agent Anderson had no authority to waive the condition that the premium should be first paid in cash, which latter was met by the argument that the contract was governed by the law of the State of New York where the policy was filled up and issued, and that there no such condition was binding.

The learned Master held that the defendants had power, under their Act of incorporation to do business out of Ontario, and in a foreign country if such business was there recognized; but disallowed the claim on the ground that the contract was governed by the law of Ontario, where the policy was signed and sealed, and that the agent had no power to waive the condition, and he gave a certificate to that effect. From that certificate the claimants appealed on the ground that, upon the evidence, the Master should have allowed the claim; that the contract was made in the state of New York; and that it was not

ultra vires of the defendants to take such risk, and that the plaintiffs were estopped from setting up that objection. The appeal was argued on May 29th, 1884, before Ferguson, J.

Falconbridge, for the claimants. The facts are undisputed. This policy was completed and issued in the State of New York and is governed by the law there. The agreement for the policy was made there, and its delivery would have been enforced there. I refer to *McGivern v. James*, 33 U. C. R. 203; *O'Donohoe v. Wylie*, 43 U. C. R. 350; *Gildersleeve v. McDougall*, 31 C. P. 164, as cases which settle that the contract arises where the final assent is given. The Master relied upon *Snarth v. Mingay*, 1 M. & Sel. 87, but that was a case of bills of exchange; and actions on bills of exchange and promissory notes are on a different footing from that of any other contract, see note a. s. 280, *Story on Conflict of Laws*, 8th ed.; *Wood on Fire Insurance*, 189 s. 93. Where the place of business is, the *lex loci* governs the contract, the place of dating shows that in this case: *Wharton's Conflict of Laws*, ss. 405, 411. See s. 421 as to final assent. As to what the law of New York is, it is agreed that the Court may look up the law, *Rice v. Gunn*, 4 O. R. 579, settles that. The two American opinions put in are to be used as arguments only.

Bain, Q. C., for the defendants. Even if the contract is not *ultra vires* it must be taken, as found by the Master, to have been executed in Ontario. The policy is dated at Toronto, and contains the Ontario statutory conditions. *Addison on Contracts*, 1875, ed. 179. There was no insurance until the premium was paid: *Walker v. Provincial Insurance Co.*, 7 Gr. 137; *Johnson v. Provincial Insurance Co.*, 27 C. P. 474. No extra hazardous risk, was to be taken over \$1,500, and this was a special risk which was worse than an extra hazardous risk, as all lumber yards are so rated.

A. C. Galt, also for the defendants. Anthony, the claimants' agent, had already been refused an insurance by

the defendants at one per cent, the rate agreed on in this case, as being too low, so that when he went to Anderson for the same rate he must have known it would be refused, and so was put upon enquiry as to Anderson's powers. The policy states that it was made in Toronto; even if that were not true the policy is conclusive and cannot be varied by parol evidence, *Chitty* on Contracts, 11 ed. 99; *Kain v. Old*, 2 B. & C. 627; *Meres v. Ansell*, 3 Wilson 275; *Hitchen v. Groom*, 5 C. B. 575 (a).

Foster, for the plaintiff, abides by any order made by the Court.

Falconbridge, in reply, refers to *Genesee Mutual Insurance Co. v. Westman*, 8 U. C. R. 487, (a).

June 12, 1874. FERGUSON, J.—The learned Master in his judgment, as reported in 19 U. C. L. J. 363 says at pp. 365 and 366 “the defence raised by the non-payment of the premium brings up the question of the *lex loci contractus*, or whether the contract was made in Ontario or New York.” He says the point was only slightly argued before him, but that it is important, for, by it must be determined the question of the defendants' liability. He says the pleadings raise the issue that a blank form of policy was sent by the defendants from Toronto to their agents in New York with authority to make a contract and fill up the blanks in New York; but that there is no evidence in support of this allegation. He says that he was, after he had intimated his opinion, applied to for leave to give further evidence to show that the policy in this case had been signed and sealed in blank by the defendants in Toronto, and forwarded to their agent to be filled up and delivered in New York to the claimants

(a) Much learned argument was had, and many American and other cases were referred to by the counsel for all parties on the points of New York law, and the power of the defendants to make contracts and do business out of Ontario, but as the judgment of the learned Judge decides the appeal on the ground that the contract was made in Ontario, and is consequently governed by Ontario law, it is needless to refer to them here.

there ; and he considered the question as to whether or not such evidence, if given, would bring the contract under the law of New York : that he was of opinion that it would not.

The letters marked Exhibits Nos. 1, 2, 3, and 4 by Mr. Badenach, which were also used before the Master, taken in conjunction with the number of the policy sued on, affords some evidence of the statement, but it cannot be said that it is shown that the agent had authority to made contracts as there stated. Condition 21 upon the policy, as varied under the statute, shows that no agent has authority to bind the company by any verbal arrangement or written agreement except in accordance with the terms and conditions of the policy, and this policy is the document sued upon by the claimant. In *Wharton's Conflict of Laws*, 2nd ed., par. 465, it is said : "The law defining the insurer's engagements is that of the place where the corporation issuing the policy has its seat ; and where the loss, if it be incurred, is to be paid. When the policy is procured by correspondence, or through the action of an agent, this rule obtains, in all cases in which the agent has no power to conclude the insurance, but refers the matter to the principal for decision. It is also held that the insurer will be liable on the policy when good by the law of the State where the insurance has its seat, though bad by the law of the State where the thing insured is situated. Hence when a local agent negotiates a policy, he having no power to act, but being obliged to refer all disputed matters (*e. g.* waiver of non-payment of premiums) to his principal, then the law which determinesthe insurers duties is that of the place of the insurer's principal office, where the disputed points are decided, and whence the policy issues. The insurance contract is governed by the laws of of the latter state, and cannot be effected by the laws of the State where the policy was delivered." See also note 2, p. 510 of *Wharton*, and the cases there referred to. I think the claimants are not in a position to say that the agent in New York had authority or power to bind the

company by any contract not in accordance with the policy sued on, and it does not appear that the agent had any power or authority to settle any disputed matters, and, so far as it appears, all such matters had to be referred to the principal, whose place of business was here.

In *Addison*, on Contracts, 8th Am. ed. 198, it is laid down that: "In the case of contracts in writing, the place where the covenantor or promisor executes or signs the contract is the place where it is made, although the contract is inchoate and incomplete, and does not obtain legal validity until something else has been done with his authority at some different place." And the author refers to the case *Snaith v. Mingay*, 1 M. & S. 92, a case that was referred to by the learned Master, which seems much in favour of the defendants contention. The reasoning of the Judges seems applicable.

After endeavouring to understand the facts as well as I can, and looking at a very large number of authorities, I have arrived at the conclusion that the Master is correct in saying that the law of the Province of Ontario is the law according to which the rights of the parties must be determined. Many other matters were argued before me with much skill and force, but it seemed to be conceded, and, I think, properly so, that if the law of Ontario is the law by which the rights of the parties are to be determined, the defence based upon the non-payment of the premium must succeed; and for this reason I think I need not say anything regarding those other matters.

I am of the opinion that the judgment of the Master is correct, and must be affirmed, and the appeal dismissed, with costs.

Appeal dismissed, with costs.

G. A. B.

[CHANCERY DIVISION.]

CARD V. COOLEY.

Will—Election—Dower—Promissory note—Double stamping after repeal of Stamp Act, 45 V. c. 1 (D.)

J. C., by his will devised as follows: "First, I will and bequeath unto my beloved wife, E. C., one-half undivided of the place where I now live being * * * so long as she shall live and no longer. I also will and bequeath unto my said wife one-half of all the goods and chattels I may own at the time of my demise * * * Third, I will and bequeath unto my grandson, D. C., and to his heirs and assigns forever, the place or homestead where I now live, it being * * * with all that appertains thereto; subject, nevertheless, to the following conditions, that is to say; my wife, E. C., shall have quiet and peaceable possession of all said premises with all that appertains to said half of said homestead for her own use and benefit as long as she shall live * * * I also will and bequeath unto my said grandson, D. C., one half of all the goods and chattels I may own at the time of my demise." In an action by the wife, E. C., claiming both the legacy and her dower, it was

Held, that she must elect. The testator having treated the homestead as one whole thing, the half of which he specifically bequeathed to his wife.

On an appeal from the report of a master who had allowed the claim of a creditor based on a promissory note unstamped at the time of its being made, and not properly double stamped until after the repeal of the Stamp Acts by 45 Vic. c. 1 (D.) It was

Held, that such double stamping was sufficient to validate the note, such right being reserved under the words "existing or accruing rights are preserved," and that no distinction could be made between a note that was current and a note that was overdue. *Caughill v. Clark*, 3 O. R. 272, and *Bank of Ottawa v. McMorrow*, 4 O. R. 345, referred to and commented on.

THIS was a suit brought by Elizabeth Card against Samuel Cooley and James Cotter Morden (executors of Joshua Card's will) and Darius Comerford.

The statement of claim alleged that Joshua Card, who was the plaintiff's husband had died, having first made his will, in which he appointed the defendants Cooley and Morden, and one Robert Bird, his executors; that Cooley and Morden had proved the will; and then set it out, the material parts of which were as follows: "First. I will and bequeath unto my beloved wife Elizabeth Card one half undivided of the place where I now live, being the south half of lot No. 34, in the 8th concession of said township of Sydney, so long as she shall live and no longer. I also will and bequeath unto my said wife half of all the goods and chattels I may own at the time of my demise, to dispose of as she may think proper for the benefit and partial support of my daughter, Phoebe Jane Card."

"Third. I will and bequeath unto my grandson Darius Comerford and to his heirs and assigns for ever the place or homestead where I now live, it being the south half of lot No. 34, in the 8th concession of the said township of Sidney, with all that appertains thereto, subject nevertheless to the following conditions, that is to say: my wife Elizabeth Card shall have quiet and peaceable possession of all said premises, with all that appertains to said half of said homestead for her own use and benefit, as long as she shall live, and pay to my daughter Salernia Card the sum of ten dollars. I also will and bequeath unto my said grandson, Darius Comerford, one half of all the goods and chattels I may own at the time of my demise."

That the said defendants, the executors, had been guilty of misconduct with their co-defendant Comerford in the management of the estate; and among other things asked for administration, and claimed the legacy of half the homestead, &c., and dower as well.

The statement of defence of the executors denied all acts of misconduct; and set out that when they had advertised for creditors, one Darius Card, son of the deceased, had preferred a claim of \$700 and interest from 1867, which on the advice of the plaintiff and their co-defendant they had refused to recognise, and that a suit had been brought to recover the same, and was then pending, and that if such suit was decided in favour of the said Card, there would not be personal estate sufficient to pay such claim in full, and by reason whereof the said executors had not been able to wind up the said estate; and that they had always been ready and willing to account for their dealings with the said estate.

The statement of defence of the defendant Comerford was to the same effect, and alleged that the plaintiff had always received her half of the proceeds of the homestead, except a small quantity of produce still unsold.

A judgment for the administration of the estate was had with a reference to the Master at Belleville.

The Master found no fraud against the executors as

alleged in the pleadings and referred to in the judgment; that the plaintiff was entitled to both her legacy and dower; and allowed the claim of Darius Card, as a creditor, upon a note for \$700, payable 7 years after date, with interest, amounting in all to the sum of \$1,475.06.

The defendants appealed against the two latter findings, and the appeal was argued at the same time as the hearing on further directions, on the fifth day of March, 1884, before Boyd, C.

Dickson, Q.C., for the plaintiff, and Darius Card, the creditor, moved for judgment on further directions, and appeared against the appeal, and contended that the executors should get no costs in a case like this: *Simpson v. Horne*, 28 Gr. 1; *McGill v. Courtice*, 17 Gr. 271.

Clute for the defendants. Darius Card's claim should not be allowed. The evidence shows that it is founded on a promissory note made in the fall of 1874, payable seven years after date. The claim is not sufficiently corroborated to establish it. The note was not stamped when it was made, and it was not properly double stamped until after it was overdue. It was not double stamped in March 1882, when 45 Vic. c. 41 was passed. That Act repealed the Stamp Acts, 37 Vic. c. 41 (D.), and 33 Vic. c. 13 (D.), and so took away the right to double stamp any note. This case is distinguishable from *Caughill v. Clarke*, 3 O. R. 269, there the note was current, here it was overdue. When the note fell due, the defendants, the executors had the right to plead the want of stamps, and that right being complete is preserved notwithstanding the repeal of the Stamp Act. The note is therefore inadmissible in evidence and cannot be used for any purpose, and the debt is therefore barred by the Statute of Limitations. The effect of the repealing Act is considered in *Caughill v. Clark*, *supra*, at page 274, by Cameron, J. The following cases were also referred to, *Wismer v. Wismer*, 23 U. C. R. 519; *Murphy v. Cotnam*, 17 L. C. R. 51; *Bank of Ottawa v. McLaughlin*, 8 A. R. 546; *Lowe v. Hall*, 20 C. P. 244; *Young v. Wag-*

goner, 29, U. C. R. 35; *Hoffman v. Ringler*, 29 U. C. R. 531; *Walker v. Walton*, 1 A. R. 579; *Fowler v. Vail*, 4 A. R. 267; *Waterous v. Montgomery*, 36 U. C. R. 1; *Boyd v. Muir*, 26 C. P. 21; *Le Banque Nationale v. Sparks*, 2 A. R. 112; *Ontario Bank v. Wilcox*, 43 U. C. R. 461. As to plaintiff's claim to dower. She should not get dower, and take her legacy under the will in addition. The widow's half is referred to as a "half undivided," and the gift to Darius Comerford is subject to the gift to the wife. *Becker v. Hammond*, 12, Gr. 485; *Westacott v. Cockerline*, 13 Gr. 79; *McLennan v. Grant*, 15 Gr. 65; *Hutchinson v. Sargent*, 16 Gr. 78; *Lapp v. Lapp*, 16 Gr. 159; *Coleman v. Glanville*, 18 Gr. 42; *McGregor v. McGregor*, 20 Gr. 450. If Darius Card's claim had not been allowed, there would have been no debts, and what the executors did was quite proper. They should get their costs in any event. The plaintiff is not entitled to her costs, as she charged fraud, and failed to prove it. Darius Comerford should get his costs, as he simply denied her right to dower in the homestead, while he admitted it in the rest of the lands.

Dickson, Q.C. The evidence shows that the note is a *bond fide* claim. The whole of the proceeds of the mill where Darius Card worked for his father, Joshua Card, went to the old man, while the son got a mere subsistence and the evidence of the plaintiff shows that the father promised to reward the son for services at the mill. There is no doubt the signature to the note is genuine, as was proved by comparison with genuine signatures, no less than thirteen being put in. As to the question of stamps. The holder of the note had a right to double stamp it at any time. "All rights acquired, &c.," were specially reserved by 45 Vic. c. 1 (D.), *Bank of Ottawa v. McMorrow*, 4 O. R. 345; *Boustead v. Jeffs*, 44 U. C. R. 255, 258. Even if there was a mistake as to the law in reference to the stamps, he should be protected: *Chapman v. Tufts*, 3 C. L. T. 95. Double stamping may be allowed by the Court after the passing of 45 Vic. c. 1: 3 C. L. T. 297 (Ed.) There is nothing here to put the widow to her election.

She is entitled to her dower, and her legacy under the will as well: *Cameron on Dower*, 44; *Coleman v. Glanville*, 18 Gr. 42. The plaintiff is entitled to her costs, as a construction of the will was sought in addition to relief.

March 12, 1884. *BOYD, C.*—The portions of the testator's will which relate to the question of election argued before me are these; "I will and bequeath unto my beloved wife one half undivided of the place where I now live, being the south half of lot 34 * *, so long as she shall live, and no longer. I also will and bequeath to my wife the half of all the goods and chattels I may own at the time of my demise, to dispose of as she may think proper for the benefit and partial support of my daughter." * * "I will and bequeath to my grandson, Darius Comerford, and to his heirs and assigns for ever, the place or homestead where I now live, it being the south half of lot 34 * *, with all that appertains thereto, subject nevertheless to the following conditions, that is to say, my wife shall have quiet and peaceable possession of [one half of] all said premises with all that appertains to said half of said homestead for her own use and benefit as long as she shall live."

"I also will and bequeath to to my said grandson, Darius Comerford, one half of all the goods and chattels I may own at the time of my demise."

I cannot agree with the Master that the widow is to have both dower in the homestead, and also the life estate in the half of it given by the will. If she takes dower in the estate, which is her legal right, and a moiety as life tenant of the remaining two thirds; or if she takes a moiety of the whole as life tenant, and dower out of the other moiety, as Mr. Dickson argued, in either case she disturbs the provisions of the will.

The cases I have cited in *Re Quimby*, 5 O. R. 738, apply with special force to the present case where we find the further element, that the testator is dealing not with his estate in the land, but with the property itself. He

refers to it as the homestead where he lived, he deals with that place as one whole thing, the half of which he gives specifically to his wife for life, as co-tenant with his grandson. The grandson has the right under the will to the possession and enjoyment of one half the homestead, and if any part of that is lessened by being allotted for dower, the scheme of the testator is frustrated. The widow must elect.

Upon the other question argued, I am not in a position to review the Master's conclusions of fact, which are supported by the evidence. I must take it that the note is genuine, signed by the testator, and a valid security unless the objection upon the law as to the want of stamps can prevail.

As I understand Mr. Clute's position, it is this: The note in question was not properly stamped on the 4th of March, 1882, when the Stamp Act was repealed by 45 Vic. c. 1. At that date the note was overdue, and a right had accrued to the personal representatives of the deceased, to plead the want of stamps, which was not got rid of by the subsequent double stamping of the note in December, 1883. If the note is invalid, he argues, for want of a stamps, it cannot be used for any purpose, and so the claim is barred by the Statute of Limitations.

The Master found that the note was properly stamped, upon the authority of *Caughill v. Clarke*, 3 O. R. 272; but Mr. Clute argues that there the note was current when the repealing Act was passed, but the present case is different in that the note was then overdue, and he makes the like distinction with regard to *The Bank of Ottawa v. McMorro*, 4 O. R. 345.

But I fail to appreciate the pertinence of the distinction. The right given by the remedial Statute, 42 Vic. c. 17, s. 13, to affix double stamps, is not limited to the currency of the note, but extends to a period subsequent to litigation thereon, and therefore after it is due, and the cause of action has accrued.

If I was correct in my view in *Bank of Ottawa v. Mc-*

Morrow, supra, that the right to affix stamps [the proper conditions being complied with under s. 13 of 42 Vic. c. 17,] was one which accompanied the possession of the instrument, then that does not appear to be a right limited to the period of its immaturity.

The line of argument adopted by Mr. Clute is practically the same as that to be found in the judgment of Chagnon, J., in *Filion v. Roy*, 6 L. News. 175. He proceeds upon the ground that there is no power to double stamp after the repeal of the Act by 45 Vic. c. 1, holding that the saving therein of all the rights acquired under the Stamp Acts relates to the right of the defendant to plead the nullity of the instrument. He lays stress on the word "acquired," and limits it to the protection of a defendant.

This decision was pronounced after *Dickison v. Normandeau*, 6 L. News. 136, by Mr. Justice Taschereau, and is in avowed conflict with it. In the latter case Taschereau, J., held that all rights were saved upon the repeal, and that one of such rights is that of the holder to affix stamps in a proper case. This is also my own view, coupling with the Repealing Act, the clauses of the Interpretation Act, referred to in the *Bank of Ottawa v. McMorrow*, whereby "existing or accruing rights are protected."

There is no reason why both sets of rights may not be included in these words, that is the right of a defendant to plead the nullity of the note, and the reciprocal right of a plaintiff to remedy the defects in every case where that was permissible before the repeal.

The Master's judgment is also supported by several of the varying views expressed by the Judges, in *Caughill v. Clark*, 3 O. R. 269,

The note in dispute bears date, Oct. 1, 1874, and was to fall due seven years after date, [*i. e.* in Oct. 1881]. The testator died on 8th of March, 1881. The Stamp Laws in force when note was made were 37 Vic. c. 47, (D.) and 33 Vic. c. 13 (D.) The first section of 33 Vic. provides that if the proper stamp is not affixed to the note at the proper time, (*i. e.*, contemporaneously with the making of

the instrument), it shall, save only in the case of the payment of double duty, be invalid, and of no effect in law or in equity. That section also provides that the holder may cure the defect by affixing double stamps, if it appears that when he became holder he had no knowledge that the proper duty had not been paid by the proper party, and if he do it as soon as he acquired such knowledge.

37 Vic. (1874,) modifies this last provision thus: "if it appears that the holder, when he became such holder had no knowledge of the defects, he may validate the instrument by paying double duty so soon as he acquires such knowledge, even though that be pending suit, and if it shall appear to the Judge that it was through mere error or mistake, and without any intention to violate the law on the part of the holder, that any such defect existed, then the instrument shall be legal and valid if the holder shall pay the double duty as soon as he is aware of such error or mistake."

By the construction placed upon this section in *House v. House*, 24 C. P. 526, it applies to cases where a note has not been stamped at all, and is held by a payee, who with no intention to violate the law, has omitted to put on stamps from ignorance of the law or of fact.

The evidence in this case shows that the holder, Darius Card, was aware that the note required to be stamped, but thought that it could be stamped at any time before it fell due. In this belief he affixed stamps in October, 1876, but insufficiently, and upon his attention being called to this by his solicitor, he put on double stamps pending this action.

The Master has found upon the evidence that the conditions entitling him so to validate the note under the Stamp Acts, have been satisfied, and having regard to the state of the decisions it is not competent for me to say that there is not evidence to justify his finding.

I would gladly have laid hold of any good reason in fact or in law, for holding that Darius Card was not a creditor of the estate. The claim and the note on which it rests is of the most suspicious and unsatisfactory character, and

I would have been better pleased had the Master reported against the claim. But as it is, his advantages for valuing the evidence were better than mine, and, as happened in *Wismer v. Wismer*, 23 U. C. R. 519, the report will have to stand, not because I approve of the result, but because I am unable to lay hold of a sufficient reason to set it aside.

The administration suit appears to me to be a very unnecessary proceeding. There is no fraud established against the executors, there is only a small balance of \$42, due from Darius Comerford to the estate, and a small balance of \$90 due from him to the plaintiff. The only piece of litigation that was justifiable was the resistance made by the defendant to the claim of the sole creditor, Darius Card. The costs of that part of the litigation should be borne by the estate as to both parties, [viz., creditor and executor.] I give no costs of the administration proceedings to the plaintiff. The action was quite uncalled for. The executors should have their costs of administration, (viz., those not provided for with reference to Darius Card,) out of any moneys coming to the plaintiff.

As Darius Comerford is found indebted in the two sums of \$42 and \$90, I award him no costs.

The proceedings to realize the estate, to pay the creditor's claims and the legacy, should be conducted by the executors at the expense of the estate.

G. A. B.

[CHANCERY DIVISION.]

MARTIN V. EVANS.

Partnership—Dissolution and division of assets—Partnership and individual property—Subsequent assignment for benefit of all creditors invalid as to personalty—Judgment under Rule 324, O. J. A.—Order made in Chambers—Summary application to set aside—Pleading.

E. & J. being in partnership, dissolved and divided their assets. Subsequently E. being sued by M., an individual creditor, made an assignment of all his estate, real and personal, for the benefit of his creditors, and by the terms of the assignment, placed his partnership and individual creditors on the same footing. In an action by M. (after he had obtained judgment) to set aside the assignment. It was

Held, that after the dissolution and division of assets, E.'s share became his separate property, and could not be assigned for the benefit of his partnership creditors until his individual debts were first paid, and that the assignment as to personalty was bad and must be set aside, but that a debtor may give a preference to one creditor over another under the Statute of Elizabeth, and that the assignment as to realty was good.

Held, also, that where an order for the signing of a judgment under Rule 324, O. J. A., was made in Chambers instead of Court, it must be taken advantage of by a summary application, and that its invalidity could not be set up in an action brought on it.

THIS was an action brought by Samuel T. Martin, a judgment creditor against Israel Evans, and the trustees (Barfoot and McKeough) to set aside an assignment made for the benefit of creditors.

The action was tried at Chatham on the 29th and 30th May, 1884, before Boyd, C.

The plaintiff's claim was upon a County Court judgment signed under Rule 324 O. J. A. upon an order of the Judge made in Chambers on the 13th November, 1883.

At the trial, it appeared that the defendant Evans had been in partnership with one Jackson, in the livery business; but that they had dissolved partnership, and divided all the assets of the firm, except the book debts, which they left to pay the firm debts, thinking them sufficient for that purpose; but which afterwards turned out to be insufficient. After the division Jackson's portion of the assets was allowed to remain in the business of the partnership which was continued by Evans, but was subsequently removed by Jackson with the consent of the trustees.

About a month after the dissolution and division, the

defendant Evans made an assignment of all his estate, real and personal, for the benefit of all his creditors, both partnership and individual, and recited therein that it was made "in order to distribute his estate equally and ratably among all his creditors, both individually and as a member of the late firm of Jackson and Evans according to their several rights claims and demands;" which assignment was made the day before the plaintiff's judgment was recovered, and for the purpose of compelling all creditors to share alike.

The defendants at the trial were allowed to amend by setting up the invalidity of the plaintiff's judgment.

The plaintiff's claim was an individual debt.

M. Wilson, with him *Bell*, for the plaintiff. The assignment cannot be upheld as to the goods: R. S. O. c. 118 s. 2. The property assigned was not partnership but individual property: *Lindley on Partnership*, 4th ed. 655. *Exp. Ruffin*, 6 Ves. 119. *Exp. Walker* 4 De G. F. & J. 509. *Exp. Sprague* 4 DeG. M. & G. 866. *Ex p. Kennedy*, 2 DeG. M. & G. 228. *Exp. Fell* 10 Ves. 347. *Moorehouse v. Bostwick*, 5 O. R. 104. The partners thought there was enough left to pay the partnership creditors, when they made the division, and the division was made *bonâ fide*. The trustees recognized the division and conversion of the property from partnership to individual assets by allowing Jackson to take and hold his share. The property assigned being individual assets the partnership creditors cannot participate until the individual creditors are paid in full, *Re Walker*, 6 A. R. 169; *Andrews v. Stuart*, 6 A. R. 508, per Patterson, J.A. *Mills v. Kerr*, 7 A. R. 774; *Badenach v. Slater*, 8 A. R. 402, 408; *Nelles v. Mullby*, 20 U. C. L. J. 92. As to the lands, the assignment cannot be upheld, because all the defendants knew of the condition of the defendant Evans. The plaintiff and other creditors were suing and pressing for their claims, and we contend that it is proved that the assignment was made to prevent them realizing their claims in full, that is to hinder or delay under 13 Eliz

Atkinson, with him *Christie*, for the defendants. The assignment is controlled by the recital, and the property is to be divided amongst the creditors "according to their several rights." The plaintiff is not prejudiced by the assignment because the property assigned was partnership assets not individual property. The division having left the partnership insolvent it was a fraud on the partnership creditors, *Re Caton and Cole*, 26 C. P. 308; *Ex p. Mayou*, 4 De G. J. & S. 664; *McDonald v. McColium*, 11 Gr. 469; *Kerr v. Bank of Commerce*, 4 O. R. 652. The plaintiff's judgment is irregular. The order under which it was signed was made by a Judge in Chambers and should have been made by the Court, Rule 324, O. J. A.; *Morrison v. Taylor*, 2 C. L. T. 101, 9 P. R. 390; *Nelles v. Maltby*, 4 C. L. T. 127; *Harvey v. Harvey*, 9 A. R. 91.

Wilson, in reply. *Kerr v. Bank of Commerce*, *supra*, is really in our favour. There it was a joint creditor who objected; moreover that case is in appeal. Here the plaintiff had to sue to prevent the estate being wrongly distributed. The plaintiff's judgment is perfectly good on its face; even if it was irregular that could not be taken advantage of now. It should have been moved against summarily or appealed, and it is too late to do that now.

June 19th, 1884. BOYD, C.—It is not competent for me to review or invalidate the judgment obtained in the County Court upon which the plaintiff sues, on the ground that the order therefor under Rule 324 O. J. A., should have been pronounced in Court and not in Chambers. The defendant *Evans* or his assignee might have had relief, perhaps in a summary application as in *Morrison v. Taylor*, 46 U. C. R. 492; but none such is made, and more than one term has since elapsed: *Buffalo and L. H. R. W. Co. v. Hemmingway*, 22 U. C. R. 562. As the judgment stands unreversed, it is to be assumed after this lapse of time, that neither party is dissatisfied with it, and the objection in this case is purely technical, as the judicial personality is the same whether the order was made in Court or in Chambers. The judg-

ment being good on its face, it now appears to me that I erred in allowing such a defence at the trial by way of amendment, *Tait v. Harrison*, 17 Gr. 458; *Huffer v. Allen*, L. R. 2 Ex. 19.

Upon the merits the plaintiff, under a line of decisions which binds me, is entitled to relief as to the personalty, but not as to the realty. There was no actual or intended fraud, no attempt to defeat or delay creditors on the part of the assignor within the meaning of 13 Eliz. So far as regards the land, he had the right under the law to prefer one creditor, or one set of creditors to another, or to equalize all in the distribution of his real estate. But such is not his right at the present day as regards personalty under the R. S. O. c. 118 s. 2. A valid deed of assignment thereunder is to be for the purpose of paying ratably and proportionably and without preference or priority all his creditors. But the Courts have made a distinction where a debtor has been member of a partnership and has individual and partnership creditors. He cannot assign his individual property to satisfy alike these two classes of creditors if there is any available partnership property.

In the present case there was a *bonâ fide* division of most of the partnership assets a month before the assignment, and the plaintiff's share, which was allotted to, and taken possession of by him, I find to be his separate estate, *Moorehouse v. Bostwick*, 5 O. R. 107. The partners supposed that the rest of the undivided assets, consisting of book debts, would satisfy the partnership creditors. But this turns out not to be the case. So that in the result we have to regard the partner who assigns, who is insolvent, the partnership of which he was a member, which is also insolvent, and the other partner who does not assign, and who appears to be solvent.

The general principle now recognized in administering insolvent estates in the case of partners is to prefer separate to joint creditors in the distribution of the separate estate of each, and to prefer joint to separate creditors in the distribution of the joint estate. Such is the mode of

division now observed in administering estates in equity, although at one time the plan adopted by the assignor in this case of distributing the separate estates *pari passu* amongst his creditors, whether joint or separate, was well recognized as just and equitable: *Ex p. Blake* Cooke's Bank. Law, 8th ed. 528 and *Ex p. Copland*, 1 Cox. 420; *Lindley* on Partnership, 3rd ed. 1232. No very satisfactory reason has been assigned for departing from this basis and adopting that which now obtains in bankruptcy proceedings, save that it is "a rule of convenience," as expressed by Eyre, C.J., in *Bolton v. Puller*, 1 Bos. & P. 547.

I do not find the mode of distribution, which is now in favour, recognized as a principle of general equity. It was referred to in *Lodge v. Prichard*, 1 DeG. J. & S. 610; not so much as a correct rule as one which harmonized proceedings in Courts of Bankruptcy and in Courts of Equity. *Lodge v. Prichard*, is referred to by Sir W. Page Wood, L. J., in *Kellock's Case*, L. R. 3 Ch. 777, as a case where the Court of Chancery adopted the rule in bankruptcy as to the administration of joint and separate estates as being the best mode of dealing with a very difficult question, and he further observes that the propriety of such a rule was severely tested in that case.

In *Lacey v. Hill*, L. R. 8 Ch. Ap. 444, James, L. J., spoke of these rules as laying down a sort of rough code of justice, because some rule must be laid down for the purpose of keeping joint and separate estates distinct, and for paying joint and separate creditors; but he regarded it as a mere artificial distinction unknown to the common law. In *Pollock's Digest of the Law of Partnership*, p. 106, this plan is referred to as an empirical way of dealing with a pressing necessity, rather than as being reasonable in itself.

The present practice in bankruptcy and equity has been recognized as embodying the proper direction to give in deeds of assignment for the benefit of creditors under R. S. O. c. 118; *Badenach v. Slater*, 8 A. R. 408. According to that, the duty of the assignor was to assign his separate personalty (that being all that is assigned here), for

the equal payment of his individual creditors, and he offended against the statute as construed by the Courts in placing his partnership creditors on an equality with his individual creditors as to this fund.

The practical mischief arising here is the inequality to which the separate creditors will be exposed if the assignment stands. Under it the partnership creditors can share ratably with the individual creditors until the separate estate assigned is exhausted, and then these same partnership creditors have a further right to realize the unassigned joint assets to which the separate creditors have no recourse. The method of distribution here should have been first to and among the individual creditors ratably, and any surplus thereafter to and among his partnership creditors ratably: *Kerr v. Bank of Commerce*, 4 O. R. 660.

The conclusion to which I am driven, by the anomalous and discreditable state of our law as to insolvent debtors, is almost a travesty upon justice. The plaintiff who as a separate creditor complains of the separate assets being partially withdrawn from the body of separate creditors, and invalidates the assignment on this ground is, by the judgment of the Court, preferred to the other separate creditors, so that he gets paid in full by the operation of his execution on the separate assets. This is practically a greater injustice than that which the Court pretends to redress in setting aside the well-intentioned provision for equal distribution made by the assignor.

The plaintiff fails, as to the land, and succeeds as to the goods. If he claims priority by virtue of his execution, and seeks payment in full to the exclusion of other separate creditors, that relief will be given without costs. If he waives his priority and agrees to a ratable division among all separate creditors, I direct that relief and give him his costs out of the fund.

G. A. B.

[CHANCERY DIVISION.]

HILL v. HILL.

Will—Tenant for life—Cost of repairs—Executrix—Costs of resisting a successful suit to establish a later will.

M. H. proved a will as executrix, afterwards a subsequent will was found dated about a time when the testator was in a weak state of health, both physical and mental. A suit was brought by S. H., the executor in the later will against M. H. to set aside the first and establish the second will, which was successful, and in which M. H. was ordered to pay the costs.

Held, that M. H., in an action for an account of her dealings with the estate, having a fair question for litigation in endeavoring to uphold the first will, was entitled to the costs thereof out of the estate.

M. H. having expended \$536.35 in repairs to the real estate and the testator's will having given her a life estate in all the real estate, and having also given her "the income of all investments of which I may be possessed for her own use, and also the principal of such investments as she may require to use for her own benefit."

Held, that the \$536.35 was properly allowed to her.

THIS was an appeal from the report of John Winchester, Esquire, an Official Referee, who had taken the reference in the absence of the Master.

The testator, Samuel Hill, died on the 5th of January, 1881, having made two wills, one dated the 12th December, 1864, in which the defendant in this action, Mary Hill (his wife) and one John Gainor were appointed executrix and executor, and one dated the 12th June, 1879, in which the plaintiff herein, Samuel Hill and one William H. Gainor were appointed executors.

Mary Hill proved the first will, and when Samuel Hill applied for probate of the second will, he ascertained that fact, and a citation was issued against her, and the proceedings were removed by order to the Chancery Division of the High Court of Justice, where he subsequently brought an action to set aside the first will and the probate thereof, and have it declared that the second will was the last will and testament of the testator, Samuel Hill.

That action was tried at St. Catharines, before Morrison, J. when the following judgment was given :

In this case I am of opinion the plaintiff is entitled to judgment for I am quite satisfied that the testator at the time he executed the will which is contested was competent to make a disposition of his estate with reason and understanding. The will was drawn under instructions given by the testator to his solicitor who had known him for many years. Mr. Currie's evidence, the circumstances attending the making of the will, his journey to St. Catharines, and the disposition of his property, no influence being used or suggestions made by anyone, made it quite clear to my mind that at the time he gave the instructions to Mr. Currie, and when he executed the will, after it was read over to him, he was of a sound and disposing mind; no doubt the testator had been for a long period suffering from disease, and, in the opinion of several witnesses, he was physically and mentally weak and not capable of making a will; but, notwithstanding, at the time of the execution of the will in question the evidence shews clearly that he was quite competent to do so. I therefore decree in favour of the plaintiff as prayed in his bill with costs.

This present action was brought by Samuel Hill, the executor under the second will, against Mary Hill, the executrix under the first will (the Gainors having renounced in both cases), for an account of her dealings with the estate; and on the trial before Ferguson, J., on December 11th, 1883, a consent judgment was made, by which a reference to the Master was directed.

On the reference, which was had before John Winchester, Official Referee, in the absence of the Master, the second will was brought in, and contained the following clauses:

"Second: I give and devise to my said wife all my household furniture and effects wherever situate and not herein specifically devised; and all money I may die possessed of, whether in my possession or on deposit, to and for her own sole use and benefit forever.

Third: I also give and devise to my said wife all my real estate, to have and to hold to her sole and only use for the term of her natural life.

Fourth: I give and devise to my said wife the income of all investments of which I may die possessed for her own use, and also the principal of such investments as she may require to use for her own benefit."

It was also shewn that some of the witnesses at the trial to set aside the first will went so far in their evidence as to say that the testator was not in a fit state to make a will at the time of the making of the second will.

The Referee made his report, and in the taking of the accounts allowed to the defendant the sum of \$536.35, the cost of certain repairs to the realty, and the sum of \$550, the costs of the suit to set aside the will.

From this report the plaintiff appealed as to these two items, and the defendant cross-appealed on the ground that the Referee should have allowed her \$600 a year out of the testator's estate, in the nature of an allowance for past maintenance; and both appeals were argued with the hearing on further directions, before Ferguson, J., on the 29th May, 1884.

Plumb, for the plaintiff. The will gives the defendant a life estate in the real estate, and directs her to pay his debts. A tenant for life is bound to repair: *Lewin* on Trusts, 7th ed., 503, 504, and cases there cited. Even a tenant for life, without impeachment for waste, is bound to do the repairs, if they are not excessive. The Referee allowed them under the clause by which she was entitled to such part of the principal of the personal estate as she required: *Holmes v. Wolfe*, 26 Gr. 228. The defendant should not get the costs of the will suit. The judgment in that suit ordered her to pay them and found her a wrongdoer. It was an improper expenditure, and was not within the words of the will "for her own benefit." As to the question of maintenance: The Referee has allowed her all she expended, and it was not shewn she required more. Such a finding would not be within the scope of the reference.

A. Howell for the defendant. The judgment in the first action does not find the defendant a wrong doer. The fact of the judgment having gone against her with costs in that case does not conclude her from recovering them over against the estate as in an administration suit. *Williams* on Executors 8th ed. 276. The defendant cannot be looked

upon as an executor *de son tort*; she was clothed with legal authority by the letters probate. Even though she were an executor *de son tort* all lawful acts by her are good and bind the proper executor. The defence of the suit was proper; up to the point of the judgment: she was simply discharging her duty : she had reasonable cause to hope to succeed. I refer to *Re Chamberlain*, L. R. 1 P. & D, 316; *Graham v. Wickham*, 2 De G. J. & S. 497; *Re Harrison, Fulton v. Andrew*, 24 W. R. 979; *Fulton v. Andrew*, L. R. 7 H. L. 448. It was the duty of the defendant to uphold the will of which probate had been granted to her: *Re Dean, Dean v. Wright*, 21 Ch. D. 581. The question of the repairs as between the tenant for life and remainderman does not arise. The report does not show that the allowance for repairs was made to her as tenant for life : she was entitled to the whole estate under the first will and could apply it to repairs or as she pleased, or she was in the position of a person in under a void deed, and making such repairs under mistake of title: *Bevis v. Boulton*, 7 Gr. 39. The former will gave her the lands absolutely, and she entered under that title. The clause in the last will has the effect of giving her the personalty absolutely: *Humphrey v. Humphrey*, 1 Sim. N. S. 536; *Fox v. Fox*, L. R. 19 Eq. 286; *Pritchard v. Pritchard*, L. R. 11 Eq. 232. The defendant should not be required to pay the balance over to the plaintiff, because she is entitled to it under the will which gives her a discretion as to applying the whole of it to her own use.

Plumb, in reply. She must hand the estate over to the executor and then make out a case to him to get it back for her own use under the clause in the will.

June 11, 1884. FERGUSON, J.—The case came on to be heard on further directions. There was, however, an appeal from the report of the Master, on the grounds that he had allowed the defendant \$550, a sum expended by her in the costs of a former suit, whereby a will of the testator under which the defendant was acting as executrix was declared not to be his last will and the present will, subsequently

made, established as the proper will; and that there had also been allowed to the defendant a further sum of \$536.35, expended by her in repairs of premises of which she is, under the present will, tenant for life. There was also another or cross appeal, on the ground that the Master had declined to allow to the defendant a claim for \$600 a year as maintenance; and it was agreed between counsel that these appeals should, for the purpose of saving costs to the estate, be argued at the hearing on further directions.

As to the \$550, the costs of the former suit, I was at first inclined to the opinion that the reasons mentioned in the case *Rennie v. Massie*, L. R. 1 P. & D. 118, 119, applied, and that these costs should not have been allowed; but upon examining the judgment of Mr. Justice Morrison, before whom such former suit was tried, and seeing that he mentions the fact that the testator had been for a long time suffering from disease, and that, in the opinion of many witnesses, he was physically and mentally weak, and not capable of making a will; but that, notwithstanding this, the evidence of his condition at the time of the making of the present will shewed that he was then capable of making a will, and looking at the reasoning in *Williams v. Henery*, 3 Swab. & Tr. 472, I am led to the conclusion that in the former suit there was a "fair question for litigation;" and I do not think that the fact that the now defendant was in that suit ordered to pay the costs precludes her from asking to be allowed these costs out of the estate that was in her hands as executrix under the former will, and the accounts were by the order of reference to be taken against her as such executrix.

It is quite true that no misconduct on the part of those out of whose pockets the money is to come when these costs are allowed out of the estate has been shown; but, according to the reasons in the case last above mentioned, it is only necessary to show this when the testator has in no way justified the litigation by his own act, and the act alluded to in that case was that the testator was, within three or four days after the making of the will, in a state of insanity.

In the case before Mr. Justice Morrison there was sickness, physical and mental weakness, for a long period, and many witnesses thought the testator incapable of making a will. Then there being, as I think there was, a fair question for litigation in the suit, the defendant here, who was the executrix, then acting under the former will, should have her costs out of the estate, and I think they were properly allowed by the Referee. See the reasoning of Bacon, V. C., in *Re Harrison. Fulton v. Andrew*, 34 W. R. 979.

Then as to the \$536 35 allowed for the repairs of the premises: There can be no doubt that a tenant for life is bound to keep the premises in repair, and the Court will not apply even undisposed of personalty in effecting such repairs: *Holmes v. Wolfe*, 26 Gr. 228 (V. C. Proudfoot at 231.) In this case, however, the will gives the defendant the income of all investments of which the testator died possessed for her own use, "*and also the principal of such investments as she may require to use for her own benefit.*" There were \$2,900 of such investments, and after having examined the accounts and the evidence taken before the Referee, I think it appears she made these repairs out of the investments, and that she had no other fund with which to do this; and further that the repairs were not at all of a fanciful character, but actually required for the reasonable preservation of the property, and to keep it in a position or state in which it could be rented in a reasonable way. The learned Referee informs me that it was on the ground that the repairs were made out of the investments, that he allowed the defendant the amount, and I am not prepared to say that he was wrong in so doing.

Then as to the cross appeal, the claim for \$600 a year for the maintenance of the defendant. It does not appear to me how the Referee disposed of this, or that he adjudicated upon it at all. The claim was not placed upon any clear ground that I could understand. It was denied that it was a matter that was embraced in the reference, and I do not see my way to allowing it here. It is not

clear that the contention is properly before me. I do not think it is before me in such a definite way as to enable me to deal with it in appeal.

I am of the opinion that both appeals should be dismissed, without costs.

Then as to the case on further directions. The order will go that the defendant pay the amount found against her, \$636 95. The judgment on the trial reserved the costs of the suit. The action was for an account from the defendant of her dealings with the estate of the testator, and to ascertain the amount with which she was chargeable as executrix acting under the letters probate issued to her in the pleadings mentioned, or as devisee or otherwise howsoever. The judgment shows this. The defendant did not resist this, and the judgment and reference were by consent. I have already said that there were, as it appears to me, reasonable grounds for the former litigation. It follows, I think, that the defendant having, as she had, the earliest probate, did not act unreasonably in taking possession of the estate. She took possession with the probate in her hand as executrix. It is not shown that she was guilty of any misconduct in her dealings with the estate, none is found against her. The accounts were necessary, and no doubt so considered by the plaintiff. The taking of them may prove very useful in protecting the present plaintiff from litigation in future and looking at all the circumstances I think the costs of all parties should be paid out of the estate, and I suppose it will follow that the defendant may deduct her costs from the amount she is ordered to pay. I apprehend there will be sufficient to pay all costs.

Judgment accordingly.

G. A. B.

[CHANCERY DIVISION.]

HILL V. MACAULAY.

Assessment of two parcels of land together—Sale for taxes under such assessment—R. S. O. ch. 180.

A. & H. were the respective owners of the north and centre parts of a certain lot, which were both occupied by H. until the year 1871, when the buildings were burned, and H. went out of possession. He subsequently paid the taxes up to 1873, when he left the neighbourhood, and did not return until 1883, and then found his part and that of A.'s had been sold for taxes, but he had received no notice of any taxes being in arrear. In an action by H. and his wife, who had subsequently acquired his title, it appeared that both pieces had been assessed separately in 1872, together in 1873, were not assessed at all in 1874, were assessed together as the "north half of lot 13, one-tenth of an acre" in 1875, together as the "north part of lot 13" in 1876, in one parcel as "north part 13" in 1877, and that they had been sold for the taxes due on both parcels down to 1877 and for those on the north piece for 1878.

Held, that the tax sale was invalid and could not be sustained, and that the plaintiffs were entitled to recover possession.

THIS was an action brought by Calvin P. Hill and Margery Hill, his wife, against John Macaulay to recover possession of a part of lot No. 13, on the east side of Front street in the town of Trenton, in the county of Hastings.

The action was tried at Belleville on March 31st, and April 1st, 1884, before Ferguson, J., when it appeared that the lot consisted of three parts, the north part belonging to the father of the plaintiff C. P. Hill, the centre part to C. P. Hill, and the south part to the defendant Macaulay.

The plaintiff, C. P. Hill, had given a mortgage on his piece, and allowed it to fall in arrear, when the plaintiff, Margery Hill, bought it, and sold the premises under the power of sale contained therein, and subsequently purchased them from the purchaser at the sale, and in this manner acquired title.

The defendant claimed to be entitled by virtue of a tax sale held in January, 1880, and the question to be decided in this case was the validity of that tax sale.

The north and centre parts of the lot had had buildings upon them which had been occupied by the plaintiffs, one as a dwelling, and the other as a shop, until they were burned in December, 1871; the plaintiff C. P. Hill had paid

the taxes up to 1873, and then moved away from Trenton, and did not return until May, 1883, when he was surprised to find that the land had been sold for taxes, and he swore he had never received any notification that the taxes were unpaid.

The evidence of the assessor shewed that the north and centre parcels were assessed separately in 1872; together in 1873; were not assessed at all in 1874; were assessed together as "north half of lot 13, one-tenth of an acre," in 1875; together as the "north part of 13," in 1876; in one parcel as the "north part 13," in 1877, and that they had been sold for the taxes due on both parcels for 1874, 1875, 1876, 1877, and for those in the father's piece for 1878.

McDougall, with him *Hilton*, for the plaintiffs. The plaintiffs have made out a good title which is not displaced by the tax sale. The north and centre parcels were known to the assessor as the separate properties of different owners. The two parcels should have been separately assessed. The plaintiffs could not have redeemed without paying the taxes on both parcels. *Beckett v. Johnston*, 32 C. P. 301, is expressly in point: there the land was in four parts, and there were at least three owners, and the effect of the assessment was to make it impossible for the plaintiff to ascertain the amount he should pay in order to redeem. Here it is just the same; even the description in the tax deed does not shew what land was meant: *Cotter v. Sutherland*, 18 C. P. 357. The land is not shewn to be in the list of the treasurer under sec. 131 of the Assessment Act, R. S. O. ch. 180: *Fenton v. McWain*, 41 U. C. R. 239. The assessment being illegal, wrongful, and indefinite, is insufficient to support the sale. The description is incorrect. "The north part, one-tenth of an acre," was more than both the Hills owned: *Booth v. Girdwood*, 32 U. C. R. 23.

Cassels, Q. C., with him, *Clute*, for the defendant. There is only one lot 13, there are no sub-divisions. The two years having elapsed, the plaintiff is not at liberty to go into the irregularities: *Proudfoot v. Austin*, 21 Gr. 566. An

erroneous assessment is not sufficient to set aside the sale : *Silverthorne v. Campbell*, 24 Gr. 17; *McKay v. Chrysler*, 3 S. C. 436; *Beckett v. Johnston*, 32 C. P. 303, has no application to this case. The plaintiffs did not tender the money and that was necessary. The defendants have only to shew the deed, the warrant, and that there were taxes in arrear. It is not necessary to particularly describe the land sold: *Stewart v. Tuggart*, 22 C. P. 284. The plaintiffs acquiesced in the manner in which the assessment was made. The treasurer might have set apart the centre parcel under sec. 118 of the Assessment Act. In *Fenton v. McWain*, *supra*, some one was in actual possession. *Ashton v. Innis*, 26 Gr. and *McDonell v. McDonald*, 24 U. C. R. 74, were also referred to.

McDougall, in reply. The description "north part of the lot," is so indefinite that it is no assessment. If there was no assessment there were no taxes, and so nothing in arrear, and the sale is bad.

June 30th, 1884. FERGUSON, J.—The action is for the recovery of possession of land, and is brought by Calvin P. Hill and Margery Hill, his wife.

The title to the land is alleged to be in the plaintiff Margery Hill. The land is described in the statement of claim as: "That part of lot number thirteen, on the east side of Front street, in the town of Trenton, in the county of Hastings, described as follows: Commencing on the western boundary of the said lot at a point distant thirty-four feet from the north-west corner thereof; thence easterly in a line parallel with the northern limit of same lot to the water's edge of the river Trent; thence southerly along the water's edge in a straight line twenty-two feet nine inches; thence westerly in a line parallel with the northern boundary of the said lot to the western limit thereof; thence northerly along said western limit twenty-two feet nine inches to the place of beginning."

This land was spoken of throughout the trial as having a frontage of twenty-four feet on Front street. When the

plaintiffs commenced to prove the title, it appeared to me, that there might be a very large number of documents to be examined, and as the plaintiff C. P. Hill had been in possession and occupation before the happening of a fire, by which the buildings upon the property were destroyed, I suggested that the plaintiffs should commence their evidence with this possession, and from that deduce *prima facie* a title. This suggestion was adopted by the plaintiffs. On the argument counsel for the defence objected that the plaintiffs had not shewn a good title; when I said that the course adopted by plaintiffs' counsel was one suggested by me: that no objection had been made to it: that if the defendant's counsel persisted in the objection then taken, I would allow the plaintiffs, if they desired so to do, to prove the title throughout, and if necessary for that purpose adjourn the case for a time sufficient to enable them to collect the witnesses, that might have gone away in the meantime, and any documents they might have taken away with them; when it was agreed that no question as to the plaintiffs' title should then, or thereafter, be raised by the defence. This was to be considered to be settled in the plaintiffs' favour. This was, of course, apart from the matter of the tax sale of the land, which was the matter really in contention. This sale for alleged arrears of taxes took place, under a warrant bearing date the 9th day of September, 1879, on the 8th day of January, 1880, and one Alphonse Parent became the purchaser at the price or sum of five dollars, which in the deed from the warden and treasurer to him, dated the 20th day of January, 1881, is expressed to be on account of the arrears of taxes alleged to be due on the land up to the 31st day of December, 1878.

The defendant claims title by deed of conveyance from Parent and one Cumings, bearing date the 26th day of September, 1881, and it is not contended that this title is not good, if the sale for the alleged arrears of taxes was good and valid; so that the question to be determined is as I understand the case single, and is as to whether or not this sale for taxes alleged to have been in arrear and unpaid was *valid*.

Mr. Thomas Wells, who has been treasurer of the municipality of the county of Hastings since the year 1877, was a witness for the defence, and he said that the sale was for the taxes for the years 1875, [1876, 1877, and those on the north part of the lot for 1878.

The northerly part of the lot was, and for anything that appears is still, owned by the father of the plaintiff, Calvin P. Hill. This part seems to be thirty-four feet in front upon Front street, though it was sometimes in the evidence called thirty-six feet. A portion of the southern part of the lot belonged to the defendant before the sale; and the part now in dispute is in fact a central part said to be twenty-four feet front, but really as appears by the description twenty-two feet nine inches.

The amount of taxes alleged to be in arrear, and on account of which the sale took place, was \$41. The books of the municipality were produced, and from these there was, even with the aid of the rolls, much difficulty in ascertaining with accuracy and certainty how the matter of the alleged arrears of taxes stood.

The defendant is the owner of an elevator standing south of the south part of this lot 13, which, independently of the tax sale, is owned by him.

Mr. Drury, a surveyor, is called, and he says that the two parts of the lot, the north part owned by the father of the plaintiff Hill, and the twenty-four feet in dispute, taken together make only seven-hundredths of an acre, and that one-tenth of an acre measured off from the northern boundary of the lot would comprehend the lot as far south as the defendant's elevator. The conveyances to the purchaser at the tax sale, and from him and another to the defendant, describe the land sold as follows: "Commencing at the northern boundary of the said lot, embracing the whole depth of the said lot to a width sufficient to make the said one-tenth of an acre, and bounded on the south by a line made parallel to the said northern boundary."

There had been buildings, one of frame on the northern part owned by the plaintiff Hill's father, and one upon the

central part owned by the plaintiff Hill. These were destroyed by fire, it was said, on the 23rd December, 1871. Up to the time of this fire the plaintiff Hill had occupied them, the one on the north part of the lot as a dwelling, and the other on the part now in question as a harness shop. On this part there is still remaining a stone foundation of a building that is spoken of in the evidence.

A certified copy of the entries in the treasurer's book in respect of the non-resident land tax up to and including the year 1877, is put in as evidence. This commences—North part lot 13, one-tenth of an acre. Collector's roll, 1870, \$7.70; part lot 13, twenty-four feet, 1871, \$0.80; \$8.85 (*sic.*); add ten per cent., 1872, \$9.35; and this mode of charging (if it can be called a mode) appears to be continued down to 1877, the charging being apparently indiscriminately against the north part one-tenth of an acre, or part, twenty-four feet, or against both, until at the end of 1877, the amount is \$30.68, but there appears to be no charge for 1873 or 1874. I think it reasonably plain that this amount is charged against both these parcels of land. A certified copy of the book for the year 1878, is also put in, and in this appears "north part and building, thirty-six feet. Lot 13, one-tenth of an acre, due 31st December, 1877, \$30.68." The taxes for 1878, and the ten per cent. are added, making the \$41; but there is another entry. "Centre part lot 13, twenty-four feet, \$4.40, with the ten per cent. added making \$4.84." This appears to me to be a new beginning as to the manner of charging the taxes against this centre part twenty-four feet. This sum, however, forms no part of the taxes for which the lands were sold.

Mr. James Simpson, who was assessor in Trenton from 1871 to 1877, inclusive, says, that in the spring of 1872, and while he was making his assessment, he asked the plaintiff Hill how he should assess this vacant property on which the buildings had been, and he understood from him that he wished it on the non-resident list. He says he was speaking of the twenty-four feet. He says he put this on the non-resident list; but the north part, belonging

to Hill's father, he put on the resident list. He says that in 1873, lot 13 was assessed to the plaintiff Hill, and he thinks it was not assessed at all in 1874. He says that in 1876 the north part of lot 13 was assessed at \$250, and this was intended to include the whole of the Hill property. He says that in making the assessment he was guided by the assessment of 1875, but he thought some things in the assessment of 1875 were not accurate, and he left out the quantity. He says, however, that he intended to include all down to the south boundary of the twenty-four feet. He says he never knew the frontages of the lot except the twenty-four feet. He says he understood from the plaintiff Hill, after he was burned out, that he owned the twenty-four feet, and that the north part belonged to his father; that in 1870, the plaintiff Hill was in possession of the twenty-four feet, and that he must have collected taxes from him, for he had collected taxes for some years as well as being assessor for so many years.

Sometime after the buildings were burned, the plaintiff Hill ceased to live in the place, and he was absent for several years. He says he expected his father to pay his taxes on the land in question while he was away, but that his father did not do so. There was a mortgage upon this twenty-four feet in favour of one Henderson, and it was through him, after default in payment of the mortgage, that the plaintiff Margery Hill obtained her title. A good deal of parol evidence was given on the subject, but I do not see that any good can arise by alluding further to it in detail.

There was an attempt made to shew that the plaintiff Hill had directed the assessments to be made just as they were made, but I think it clear that this failed. One can scarcely comprehend the possibility of a man's giving directions to have assessments made as these appeared to have been done.

From all the evidence it appears to me that the lands of the plaintiff Hill which are now the lands of his co-plaintiff if she is right in her contentions here, were assessed (in a

way that it is difficult to understand clearly) in conjunction with the lands of another down to 1877, and that the lump sum claimed to be in arrear for taxes, and for which those lands and the lands of that other were sold, was composed of these assessments, to which was added the assessment of the lands of that other for the year 1878, making the \$41.

It was contended by counsel for the defendant that under the last clause of s. 118, R. S. O. c. 180, the treasurer might, upon application to him, have set apart the twenty-four feet and the amount properly chargeable against it, but I do not see how he could do so, and I think he said in his evidence that he would not have done so, and that under such circumstances he could not do so. So far as I am able to perceive, it does not appear how much was charged against each parcel between the years 1872 and 1878, and for the years 1871 and 1872, what was intended is left largely to conjecture. Even if the section 118 were applicable, I do not see how the division could be made, nor do I see how any such assessment can be sustained as good. Hill could not, I think, have insisted upon the treasurer's receiving from him the proper proportion of the taxes for which the whole lands were sold, even if he could himself have ascertained the proper sum, and for the same and perhaps additional reasons he could not, after the sale have redeemed his own lands without paying the taxes and percentage upon the whole, and I cannot see how, under such circumstances, default could have been made and taxes become in arrear within the meaning of the law on the subject, and I think the view and language of Mr. Justice Osler, in the case *Beckett v. Johnston*, 32 C. P. 323, apposite. I think the principles of the cases *Ley v. Wright*, 27 C. P. 522, and *Fleming v. McNabb*, 8 A. R. 656, may properly be applied to this case, and I am of the opinion that the sale for alleged arrears of taxes cannot be sustained. The result is, that the plaintiffs succeed in their contention, and the judgment will be for them, with their costs of suit.

Judgment for plaintiffs, with costs.

G. A. B.

[CHANCERY DIVISION.]

RE CORNISH

Mechanics lien—Unfinished contract—New contractor—Ten per cent. drawback.

W. entered into a contract with M. to do certain carpenter work on buildings for a contract price of \$2,690, which was afterwards, after taking an account of the extras to and omissions from the contract, increased to \$2,781.85. He proceeded with the contract, and did work to the value of \$2,350 and received on account, \$2,125, when he failed and notified W. that he could not proceed with the contract. W. then entered into a contract with C., who was M.'s surety, to finish the work, which he did at an expense of \$525.88. Certain sub-contractors and employees of M. filed liens, and W. moved to have them vacated on the ground that he was entitled to apply the 10 per cent. drawback in completing the contract.

Held, (reversing in part the order of Proudfoot, J., who dissented,) that the amount upon which the 10 per cent. drawback was to be calculated was not the whole amount of the contract price, but the amount of the work done by the contractor when he failed and abandoned the work.

THIS was an appeal from an order made in chambers by Proudfoot, J., on an appeal from an order of the Master in Chambers.

The application was made in Chambers in the first instance upon affidavit evidence, when it appeared that one Wingate entered into a written contract with one Martin, for the latter to do certain carpenter work on buildings for the sum of \$2690. In the contract there was no agreement to prevent the filing of liens. Items amounting to \$115 were struck out of the specifications, but extra work to the extent of \$206.85 was done, and was added to the contract price. After Martin had done work to the extent of about \$2,350, and received payment of \$2,125, he became insolvent, and notified Wingate of his inability to carry out the contract, and abandoned the same. Wingate then entered into a contract with one Carroll, who was Martin's surety, to complete the work, which Carroll did at an expense of \$521.88. Liens were filed by Cornish & Co, Hastings & Co., and Knowles & Co., for materials supplied to Martin, and used upon the buildings; and there were liens also filed for wages, amounting to \$40, by three men

who had done work for Martin on the said buildings during the thirty days previous to his abandonment of the contract.

Allan Cassels, for Wingate, moved for an order to vacate the liens on such terms as might be thought proper, contending that, although Wingate had to pay the liens for wages out of the balance of the contract price left in his hands after Martin's insolvency, he was entitled to apply the rest of the ten per cent. drawback so far as required in completing the contract through Carroll: R. S. O. c. 120, ss. 3, 6, 11; 41 Vic. c. 17, ss. 1, 2, (O.); 45 Vic. c. 15, s. 4 (O.); *Phillips* on Mechanics Liens, 2nd ed., 233; *Briggs v. Lee*, 27 Gr. 464.

R. Snelling for Cornish & Co.

G. Ritchie, for Hastings & Co.

W. A. Reeve, for Knowles & Co.

Appeared and shewed cause, and contended that the ten per cent. drawback on the whole of the work done by Martin, was applicable to the liens, and should be paid to the lien holders.

November 1, 1883. R. G. DALTON, Q.C.—THE MASTER IN CHAMBERS.—Apart from the reserve of 10 per cent. and from any question of collusion as to payments made by the owner to the contractor, it seems that under our Mechanics Lien Statutes, the lien of a mechanic, as distinguished from that for the wages of a laborer, can only be enforced where the contractor himself could enforce it against the owner. As to the wages of a laborer strictly, it is different. (See figures in account.)

After deducting the amount paid to Martin, \$2125, and the amount to be paid to Carroll, \$521.88, and taking an account of the extras to, and omissions from the contract, there is left \$134.97, which is applicable first, to the payment of the claims for wages, and after that to be applied in payment of the mechanics' liens proper.

Under the circumstances of this case, I do not think the

10 per cent. clause operates for the benefit of any one, except of the laborers as to their claims for wages. I say this having reference to the 3rd. 6th, and 11th clauses of R. S. O. c. 120, to the act of 1878, c. 17, ss. 1 & 2, and to the act of 1882, c. 15 ss. 4 & 5, to *Phillips on Mechanics Liens*, 2nd ed. p. 233-237-8-9, *et seq.*

The liens I think are not sustainable at all beyond the sum I have above stated, and the registry thereof should be vacated on payment of that sum.

ACCOUNT.

	\$2125 00	paid Martin.
	521 88	to be paid Carroll.
	<hr/>	
	\$2646 88	whole sum paid or to be paid to both contractors.
	Extras \$160 35	Martin.
	46 50	Carroll.
	<hr/>	
	206 85	
Deduct omissions	115 00	
	<hr/>	
	\$91 85	difference to be deducted from the \$2646.88.
	\$2646 88	
	91 85	
	<hr/>	
	\$2555 03	
Whole Contract Price	\$2690 00	
Deduct above	2555 03	
	<hr/>	
	\$134 97	

The wages of the laborers spoken of must be first paid, and the balance be distributed among the mechanics' lien holders.

From this order, two of the lien holders, Cornish & Co. and Hastings & Co., appealed, and the appeal was argued by the same counsel, before Proudfoot, J., on November 12, 1883, and the following judgment was given.

November 28, 1883. PROUDFOOT J.--By the R. S. O. c. 120, s. 3, persons who furnish materials for buildings, commonly called material men, are in the absence of agreement to have a lien for the price of the materials upon the building. By the sixth section, the lien was not to attach so as to make the owner liable for any greater sum than that payable to the contractor, and by the 11th section payments made in good faith to the contractor before notice in writing of the lien were protected.

The Act of 1878 (41 Vict. c. 17 (O.)) amended the 11th sec. so as to protect payments made in good faith up to 90 per cent. of the price of the materials, if made before notice in writing of the lien, and the lien was to attach upon 10 per cent. of the price for 10 days beyond the delivery of the materials or the completion of the work.

By the Act of 1882, (45 Vict. c. 15 (O.)) further provision was made in favour of mechanics and laborers, giving them a lien for 30 days wages, notwithstanding any agreement to exclude a lien between the owner and contractor, and to the extent of 10 per cent. of the price to be paid to the contractor to have priority over all other liens, and over any claim by the owner against the contractor by reason of the latter failing to complete the work. The 5th sec. provides that where any person, other than the contractor, has supplied materials for the execution of the contract, the owner shall be entitled to retain 10 per cent. in the absence of a stipulation to the contrary, for a period of 30 days after the completion of the contract.

These enactments show the progress of legislation in favour of mechanics, laborers, and persons furnishing materials for the erection of buildings. The R. S. O., c. 120, protected all payments made in good faith. This was modified so as to protect them up to 90 per cent. of the price only, for ten days beyond the completion of the work. And this was further modified by giving priority to mechanics and laborers over other lien holders, and to retain 10 per cent. of the price for 30 days after the completion of the contract.

In the present case the original contractor failed to complete his contract, and his surety entered into a new contract for the completion of the work, and finished it. The owner did not retain the 10 per cent. of the work done by the original contractor, and claims that he is only liable to retain 10 per cent. of the work done by the person who completed the contract.

This seems to me to be at variance with the meaning and intention of the statutes, and a case might readily be

conceived in which the lien of the mechanics, labourers, and material men, would be rendered valueless by such a construction. The 10 per cent. of the whole price is to be retained for the benefit of those who may be entitled to liens according to their priorities, and the owner is not to be at liberty, on failure of the original contractor, to apply the 10 per cent. he ought to have retained, to the completion of the work.

I allow the appeal, with costs.

From this judgment Wingate appealed to the Divisional Court, and the appeal came on to be heard on February 23rd, 1884, before Boyd, C., and Proudfoot and Ferguson, JJ.

Allan Cassels, for the appeal. The owner is entitled to apply the whole balance in his hands to complete the work: *Coatsworth v. The City of Toronto*, 10 C. P. 73. The owner is not liable for any greater sum than that due the contractor. The Master was right in not granting costs to the lien holders: *Hovenden v. Ellison*, 24 Gr. 448; *Rand v. Leeds*, 2 Phila. (U.S.) 160; *Mehrle v. Dunne*, 75 Ill. 239.

R. Snelling, with him *G. Ritchie*. The facts are not materially disputed. There was only one contract. The surety virtually only completed the contract that he had guaranteed. The true contract price is the amount settled and ascertained between the parties, which was the amount of the contract. The lien holders should have got their costs.

June 19, 1884. BOYD, C.—The measure and extent of a mechanic's lien depend upon what is to be found within the four corners of the Acts creating the right to a lien.

By R. S. O. c. 120 s. 3, the right may fail to arise by an agreement to exclude it, and when it does exist, it is limited in amount to such sum as is justly due to the person entitled to such lien. Applying that to this case, Martin, the contractor, did work under a contract (which did not exclude a right of lien), to the value of \$2350, and then failed financially. The contract provided for his

making default and authorized the owner to employ another person to prosecute and complete the work. Thus, the contract was divisible in its nature, it contemplated an original and a substituted contractor, and it therefore in my estimate of the matter involved a lien divisible in amount according to circumstances.

In this case I do not see how Martin, with whom the sub-contractors, Cornish and Hastings, were in privity, can have a lien to a greater extent than up to the amount justly due to him when he made default, viz. \$2350. This being so, the sub-contractors rights do not rise higher than those of the contractor with whom they were in privity. I think that point was decided by Blake, V. C., in *Forhan v. Lalonde*, 27 Gr. 604. This limitation of the sub-contractor's right is in terms to be found in sec. 6, as expounded in *Crone v. Struthers*, 22 Gr. 248, which provides that the lien shall not attach so as to make the owner liable to the payment of any greater sum than that payable by the owner to the contractor; and that when it is claimed by a sub-contractor, the amount shall be limited to the amount payable to the contractor.

The contractor, by section 2, means a person employed directly by the owner for the doing of the work, and in this case there were two contractors, the first Martin, and upon his default the second Carroll, who finished the work. It is said that Carroll was surety for Martin, and was practically completing that which he was bound to do by his contract of suretyship, and was doing it by the terms of the bargain between him and the owner for the balance of the contract price. But none the less were there the two persons employed directly by the owner, with one of whom the sub-contractors in question were in privity, and with the other of whom they were not in privity. I do not see that the matter can be viewed differently from what would be the result if the two contractors had been perfect strangers to each other, and the one having done part of the work and failed, there had been a re-letting of the unfinished part of the contract to another. The lien would

then attach in favour of the sub-contractors under the first contractor upon ten per cent. of the price to be paid by the owner to that first contractor by sec. 11, of 41 Vic. c. 17, (O): *Petrie v. Hunter*, 2 O. R. 233.

This case raises to some extent the point which was left unsettled in *Briggs v. Lee*, 27 Gr. 467, where the former Chancellor says, questions may arise as to whether section 11 as it stood originally, or as amended, applies to such a case as this, where the work is abandoned by the contractor, and it has taken the whole contract price for the owner to finish the work. According to the best judgment I can pass upon the complicated and embarrassing legislation which environs the rights of lien-holding working-men, the lien is, in such cases as the present, divisible, and sub-contractors are limited to such sum as is justly due to each chief contractor with whom they are in privity; and in cases under the 11th section, as amended, to the further limitation of ten per cent. upon that sum, which should in every case be retained by the owner to answer such claimants. It is not necessary to consider what would be the result, if the contractor making default had occasioned damage to the owner above the balance of the contract price, a state of facts which is hinted at in sec. 4 of 45 Vic. c. 15, (O.,) but left for some future plaintiff to ascertain by the assistance of the Courts. My conclusion is, that the judgment should be varied by declaring a lien on ten per cent. of \$2,350, instead of on \$2,735, the total contract price, as directed by the judgment in appeal.

In other respects I agree with the judgment appealed from, which should be affirmed, with costs.

I have referred to *Mehrle v. Dunne*, 75 Ill. 239, and the cases in *Phillips* on Mechanics' Liens, in par. 145, and other places, but they do not much aid in interpreting our own statutes.

PROUDFOOT, J.—I retain the opinion I have already expressed in regard to the construction of the Mechanics Lien Acts. The question in this case turns upon the con-

struction of sections 3, 6, and 11, of the R. S. O. c. 120, and the amendment of section 11, by 41 Vict. c. 17, s. 1, (O.)

By s. 3, in the absence of an agreement to the contrary, any person furnishing materials to be used in the construction of a building, shall by reason of so furnishing, have a lien for the price of the materials upon the building and lands occupied thereby, and limited in amount to such sum as is justly due to the person entitled to such lien. By s. 6, in case the lien is claimed by a sub-contractor, the amount that may be claimed in respect of it, shall be limited to the amount payable to the contractor by whom the work has been done. By s. 11, as amended, all payments up to 90 per cent. of the price to be paid for the work, made in good faith by the owner to the contractor, before notice in writing by the person claiming the lien are protected.

The effect of these sections is, to give to the material man furnishing the materials upon the order of the contractor, a specific lien upon 10 per cent of the price of the work. Mr. Holmsted, in his useful book, says that the price of the work means the price to be paid under the contract, by virtue of which the payments are made. (p. 28, n. b).

This lien is given against the owner, and is made a charge on his property, though limited to the amount due to the contractor, and the reason is plain, because the owner receives the benefit of the materials, they become his property, and go to increase the value of his land or house.

It would seem to be immaterial how many successive contractors there might be, the 10 per cent. is to be 10 per cent. of the price to be paid for the work, the entire work of building the house, nor is it of importance that the materials be furnished to one of the contractors only, the 10 per cent. of the whole price is for the benefit of the material man.

The 45 Vict. c. 15 s. 4 (O.), does not seem to affect this question; it gives the lien for wages priority over all other liens,

and over any claim by the owner for damages for non-completion. If any inference is to be drawn from this clause it would rather be that all liens are to have a preference over such claim for damages.

Forhan v. Lalonde, 27 Gr. 600, decided nothing but that when the original contract provided that there should be no lien, no lien could exist.

Briggs v. Lee, 27 Gr. 464, was decided upon the effect of sections 3, 8, and 9, not upon those now in question. The late Chancellor indeed suggests that the question now being considered might arise, but he expressed no opinion upon it.

But the circumstances of this case do not require us to decide what the effect of these acts would be in the event of an original contractor failing to complete his contract, and its being finished by an independent contractor.

Martin was the original contractor, and Carroll became his surety, entering into a bond, endorsed upon the contract, for payment of \$2,690, with a condition to be void if Martin should and would in everything well and faithfully execute and perform his contract.

When Martin, after doing work to the value of \$2,350 failed to complete it, an agreement was entered into between Wingate and Carroll, which recited Martin's agreement; that Carroll was surety for him; that Martin had done part of the work and received part of the pay; that Martin having failed to complete, Wingate was about to employ other persons to finish the work in pursuance of powers in agreement with Martin, and that Carroll had offered to do the work; and then Carroll agreed with Wingate to execute and perform all the works and provide the materials mentioned in the contract with Martin in accordance with the terms of that contract, and would assume all the covenants and liabilities of Martin to Wingate in respect of the building, and to indemnify and save harmless Wingate therefrom. And Wingate agreed to pay Carroll the balance payable under the said agreement.

It is plain that this agreement imposed no liability upon Carroll to which he was not already subject. It was merely

arranging for the finishing of the work, which he was bound to see finished, and he undertook all the liabilities to which Martin was subject. One of these was to have ten per cent. retained for the benefit of sub-contractors. And Wingate was to pay nothing more than he would have had to pay Martin had he finished it.

The original contract price was		\$2690 00
There were extras to be added	\$206 85	
And there was to be deducted	115 00	91 85
		<hr/>
Making the whole price of the work		\$2781 85
Ten per cent. of this sum should have been retained by Wingate, to meet the claims of material, men, &c.	\$278 18	
Some small deductions		4 68
		<hr/>
		\$273 50
The order directs that out of this sum		
Wingate should pay to Clynia	\$30 00	
to Tenightly	5 00	
to Neligan	5 00	40 00
		<hr/>
And to pay into Court the balance		\$233 50

The Master has found that there is in Wingate's hands \$174, and requires him to prove payment of the \$40 due for these small liens, and to pay the balance of \$134 into Court. Of this sum \$51 would represent 10 per cent. of the price of the work done by Wingate, and \$83, would be on account of the work done by Martin. The notice of appeal was correct enough therefore in assigning as a ground of appeal, that the Master should have charged Wingate for not retaining 10 per cent of the price of the work done by Martin.

I think my order should be affirmed.

FERGUSON, J.—The sixth section of the Act, c. 120 of the R. S. O., provides that every lien under the Act shall attach upon the estate and interest, legal or equitable, of the owner in the building, erection or mine upon or in respect of which the work is done or the materials, or

machinery placed or furnished, and the land occupied there by or enjoyed therewith. This section, however, contains the words, "but the lien shall not in any case attach upon such estate and interest, so as to make the same or the owner thereof liable to the payment of any greater sum than the sum payable by the owner to the contractor."

The eleventh section of this Act provided that all payments made in good faith by the owner to the contractor, before notice in writing by the person claiming the lien has been given to such owner of the claim of such person, shall operate as a discharge *pro tanto* of the lien created by the Act; but that the section should not apply to any payment made for the purpose of defeating or impairing a claim to a lien existing or arising under the Act. This eleventh section was by section one of the Act 41 Vict. c. 17, (O), amended so as to read as follows:

"All payments, up to ninety per cent. of the price to be paid for the work, machinery, or materials, as defined by section three of this Act, made in good faith by the owner to the contractor, or by the contractor to the sub-contractor, or by one sub-contractor to another sub-contractor, before notice in writing by the person claiming the lien has been given to such owner, contractor or sub-contractor (as the case may be) of the claim of such person, shall operate as a discharge *pro tanto* of the lien created by this Act, but this section shall not apply to any payment made for the purpose of defeating or impairing a claim to a lien existing or arising under this Act."

This is a case of a contract for the erection of two dwelling houses for the contract price or sum of \$2,690, made between Martin and Wingate, Martin being the contractor and Wingate being the owner. Martin proceeded with the work in pursuance of the contract to the extent of \$2,350, and then failed financially and ceased doing work under the contract. The remainder of the work was afterwards done under a contract between Wingate and one Carroll, who was surety for Martin for the performance of his contract. The consideration that was to be paid Carroll

is thus stated in the agreement with him "the balance payable under the said agreement with the said Martin," and, under the said agreement, Carroll completed the work and no damages seem to have been sustained by the owner by the default.

Mechanics' liens are claimed by persons who were in privity with, and creditors of, Martin, but no such claims are made by persons, creditors of Carroll. It appears that Martin had been paid \$2,125. There appear also to have been some extras above the contract price in excess of what are called "omissions from the contract," such excess being \$91. There seem to be three contentions in regard to the amount upon which the ten per centum should be calculated for which the owner is liable to the lienholders. One is that it should be computed upon the sum of \$2,350, the amount of the work done by Martin; another that it should be upon the original contract price \$2,690; and the third that it should be upon this with the amount of the extras added thereto.

I think the word "contractor" in the sixth section of the Act R. S. O. c. 120 where it occurs in the passage, "but the lien shall not in any case attach upon such estate and interest, so as to make the same or the owner thereof liable to the payment of any greater sum than the sum payable by the owner to the contractor," means the contractor who was in privity with the claimant as a lien holder, and, as before stated, none of these lien holders were in privity with Carroll. They were all creditors of Martin.

If it were not for the amendment of section eleven of the Act before mentioned, the "sum payable by the owner to the contractor" would, I apprehend, be ascertained in the ordinary way when the contractor has failed to complete the work, or the work has, for good cause assignable under the provisions of the contract, been taken out of his hands before completion where there is no claim for damages as such, namely: by adding the extras to the contract price, then deducting what has been paid to the contractor, and from what remains deducting such sum as would, when

the event occurred upon which the contractor ceased to carry on the work, have been fairly and justly necessary to expend in completing the work according to the contract : *Pawley v. Turnbull*, 3 Giff. at p. 89. But the amended eleventh section must be read in conjunction with the sixth section, and I apprehend, (although I have great difficulty in endeavouring to understand them, when read in conjunction); that by the eleventh section, payments by the owner to the contractor when over ninety per centum of the price to be paid for the work do not operate as a discharge *pro tanto* of the lien created by the Act, and I do not think that the word "price" means the whole contract price or lump sum to be paid for the whole work, but only the price to be paid for such work as the contractor performs under the contract.

Then if this view is correct, and if the word contractor means as I have said I think it does, a contractor with whom the claimant as a lien holder is in privity only, the conclusion is, that the ten per centum in this case must be computed upon the \$2350, the price of the work done by Martin.

The provisions of section 4 of 45 Vic. c. 15, (O.) have not, nor has any implication to arise from them any material bearing on the case, so far as I am able to perceive.

I was at one time much impressed with the view that the contracts between the owner and Martin, and the owner and Carroll, might be considered as one contract, Carroll having been the surety for Martin, and upon Martin's default having entered into the contract, he did with the owner, and completed the work under it. There were however, in fact two contracts with the owner, one by Martin and one by Carroll, and there was no privity whatever between Carroll and the persons claiming as lien holders, and after the best consideration I have been able to give the subject, I am of opinion against it.

I think the ten per centum should be computed upon the \$2350. In other respects I think the judgment is correct, and should be affirmed.

G. A. B.

[CHANCERY DIVISION.]

GARDINER v. CHAPMAN.

*Bridge causing stagnant water—Riparian owner—Rideau Canal—
8 Geo. IV. c. 1, s. 15—Access by water—Injunction.*

C. the owner of two lots of land divided in one place by G.'s land, and in another by a bay formed by the waters of the Rideau Canal, which washed the shores of all these lots, began to construct a bridge between his two lots for easier access between them, which bridge would have the effect of cutting off G.'s land from the canal, and of making the water between the bridge and G.'s land stagnant.

In an action by G. against C. for an injunction to compel him to desist from the work, and remove that part already constructed. It was

Held, that G. had the rights of an ordinary riparian owner, and that the stream being a navigable one made no difference, except that those rights are subject to the public right of navigation, that those rights had been injuriously affected by the defendant, that the plaintiff showed that an injury would result to him if the work was completed, and that he might in good time bring his action to prevent the wrong, that even if the bay was not part of the Rideau Canal itself, so as to give him the rights of an owner and occupant of lands adjoining the canal under 8 Geo. IV. c. 1, s. 15, he was entitled to use it as a means of access to the canal, and that on the evidence the plaintiff was entitled to his injunction.

THIS was an action brought by Robert Gardiner against Chancey E. Chapman for an injunction to restrain the further building, and to compel the removal, of a certain bridge, in course of erection by the defendant.

The plaintiff's statement of claim alleged, that he was the owner of the east half of lot 2, in the seventh concession of the township of Leeds, in the county of Leeds; that the defendant was the owner of the north half of the west half of the same lot, and the south part of lot 2 in the eighth concession; that all the properties are washed by the Rideau Canal, a navigable water which forms a bay there, and bounds the two properties in the seventh concession on the north, and that in the eighth on the west and covers the north west corner of the plaintiffs lot, and affords him access to the said Canal, and means of watering his cattle; that the defendant had begun to construct a causeway or embankment through the waters of the said canal from the north east angle of his lot in the seventh concession, to the south west angle of his lot in the

eighth concession, the effect of which would be to cut off the plaintiff from access to the said canal, and render the water between the embankment and the plaintiff's land stagnant; that he had required the defendant to desist from constructing said embankment, and he had refused; and that the plaintiff's land will be seriously diminished in value if the defendant is allowed to complete or maintain the work begun by him.

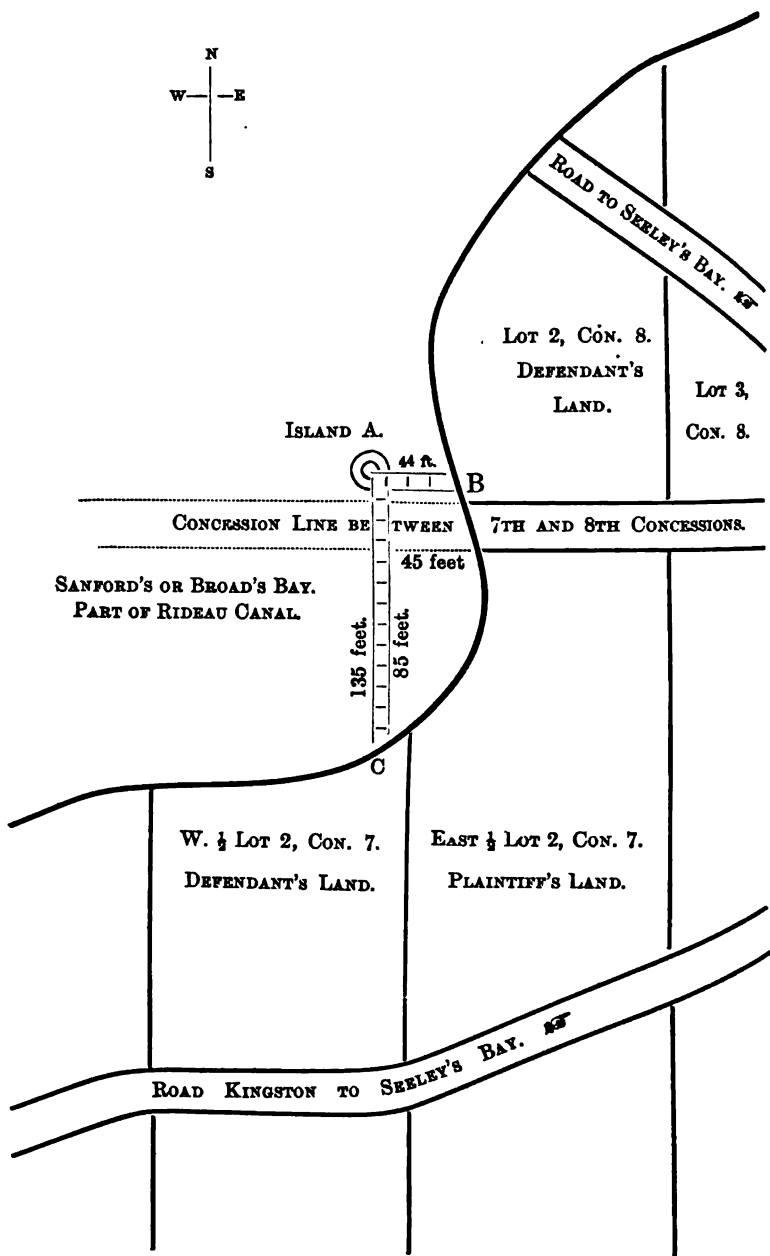
The defendant's statement of defence denied that the waters of the said Rideau Canal were navigable waters; and stated that the said waters formed a bay between his two pieces of property, and that it was necessary for him in order to properly use the same, to have an easy and short access between them; that in order to get such access it was necessary to construct a bridge across the said bay; that about a year before he had constructed a bridge there, which had been washed away; that he was constructing another with proper spaces to allow the water to flow through freely to the plaintiff's land, and denied that he was constructing a causeway or embankment, or that the bridge that he had begun would cut off the plaintiff from access to the canal, or render the water stagnant or unfit for use.

The action was tried at Kingston, on May 13, 1884, before Ferguson, J., when it appeared by the evidence that the bridge in dispute was to be built from the point C., to the island A, and then to the point B., (see plan next page,) and that the defendant had access from the one lot to the other by the roads to Seeley's Bay, (see plan) which caused a detour of about a mile. The other facts appear in the judgment of the learned Judge.

Walkem, Q.C., and J. B. Walkem, for the plaintiff.

Britton, Q.C., and McIntyre, Q.C. for the defendant.

May 13, 1884. FERGUSON, J.—It has not been contended, and I think it could not be successfully contended, that the plaintiff has not all the rights of the ordinary riparian



proprietor. The stream has I think been shewn to be a navigable one, its being a canal, and to a large extent artificial, does not prevent the owners upon it from having these rights. The canal was, as was not disputed at the bar, constructed between 40 and 50 years ago and there has been enjoyment for a much longer period than that necessary in such a case, the plaintiff being still in the enjoyment of the right. As to these, there was no contention whatever, its being a navigable stream cannot make any difference in this respect, except that the rights are subject to the public right of navigation.

The language of Lord Cairns, in *Lyon v. Fishmongers Company*, 35, L. T. N. S. 571, where he says that the doctrine would be a serious and alarming one, that a riparian owner on a public river, or even on a public tidal river, had none of the ordinary rights of a riparian owner, as such, to preserve the stream in its natural condition for all the usual purposes of the land seems applicable here. This however need not be further discussed, as Mr. Britton candidly admitted that the plaintiff is entitled to these rights; but contended that they had not been interfered with by the defendant.

On this branch of the case, I find upon the evidence, (and I feel it my duty to say here, that there were some of the witnesses for the defence that did not appear before me to good advantage,) that the work contemplated and partly constructed by the defendant, would if completed, not only affect, but I think seriously affect injuriously the acknowledged riparian rights of the plaintiff by causing stagnation and consequent pollution of the water.

I think that the evidence shows this, and I cannot perceive how it could well be otherwise. There are other ways in which it has been shown that the plaintiff's rights would be injuriously affected, but this one appears enough.

It was contended that the plaintiff should show that he had actually sustained injury in this respect before he could succeed upon this contention. It is true that the defendant has not been shewn to have been guilty of a

trespass upon the plaintiff's land, and if the action were brought at common law when the form of action was material, it would have been an action on the case, as for a resulting injury, and this injury would have to be proved before he could succeed.

The action, however, is brought for an injunction, and the plaintiff has, as I have already said, shewn that the injury would arise if the work were completed. In such a case the plaintiff may, I think, either wait until he has sustained damages, and then bring his action to recover them, or in good time bring his suit for the injunction to prevent the wrong.

The plaintiff in this instance has done the latter, and I am of the opinion that he is entitled to succeed. There is no doubt at all that the defendant intended to complete the work or that he will complete it, if not enjoined against so doing, and I think the plaintiff has taken a proper course in bringing this suit as early as he did.

I am also strongly inclined to the opinion that the plaintiff brings his case within the spirit and meaning of the 15th section of the Act 8 Geo. IV. c. 1, giving certain rights to the owners and occupiers of any lands adjoining the canal. That the plaintiff is an owner and occupier of land adjoining this water was not, and could not, be disputed; but it was contended that though the evidence shewed the water to be the waters of the canal, they were not the canal itself, and that for this reason the plaintiff had not these rights.

It was shewn that there is a continuous stretch or sheet of water from the plaintiff's land to the track of the steamers and vessels on the canal, and that this is of sufficient depth to float boats and vessels of very considerable dimensions throughout the whole distance from a line within a few feet of the plaintiff's land. In this there is shewn to be, however, a considerable number of stumps and snags; and it appeared that the plaintiff had not made use of it for any of the purposes mentioned in this 15th section. I am nevertheless strongly inclined to the opin-

ion that he has the right so to use the water, and if it were necessary for the purposes of the decision of the case, I should be prepared to hold that he has these rights, and the right of free access through and upon these waters to the canal proper, by which I mean the usual track of the vessels navigating it; and I think it is idle to contend as the defendant did contend; that even assuming that the plaintiff has these rights, the work contemplated and partly constructed by the defendant would not, if completed, injuriously interfere with them; and besides I am of the opinion that what the defendant has attempted to do is a most unreasonable thing, and he seemed himself in the witness box to speak unreasonably about it.

I am of the opinion the plaintiff is entitled to the injunction and to the order for removal of the part of the work already done, and the judgment is for the issue of the injunction, for the mandatory order, and for costs of suit to be paid by the defendant to the plaintiff forthwith after taxation, including the costs of the motion for the interim injunction.

G. A. B.

[CHANCERY DIVISION.]

DICKSON V. DICKSON.

Will—Construction—Restraint on alienation.

A testator, by his will, dated June 25th, 1866, devised to the plaintiff "and his heirs and executors for ever," a parcel of land, subject to the following proviso: "That he neither mortgage nor sell the place, but that it shall be to his children after his decease." The plaintiff had children living at the date of the will. The testator died in 1867.

Held that the plaintiff could not, by his own conveyance, confer an indefeasible title upon an intending purchaser, and that the preferable construction of the devise was to give the plaintiff an estate for life, remainder to his surviving children for their lives, remainder to the plaintiff in fee.

THIS action was brought by John Dickson, to obtain the construction of a clause in the will of Joseph Dickson, his father, who died in 1867. By his last will, dated January 25th, 1866, he devised to the plaintiff a parcel of land in the following terms: "I also give and bequeath to my son John Dickson (the plaintiff), to his heirs and executors forever, the following premises, namely: the south half of the farm, with the half of the dwelling house, and all the buildings presently on the farm; that is to say, the south half of the south half of Lot number 25, in the seventh Concession of the Township of York and County of York, and that, too, on the following conditions, namely, that he neither mortgage nor sell the place, but that it shall be to his children after his decease." It was admitted that the plaintiff had children living at the date of the will.

The action came on by way of motion for judgment on the pleadings, on January 24th, 1883, before Boyd, C.

J. Bethune, Q.C., and J. Crickmore, for the plaintiff. The effect of the will is to give the plaintiff an estate tail general, according to the rule in *Shelley's Case*. The word children must be read as "issue of the body." The restraint on alienation is wholly void: *Gallinger v. Farlinger*, 6 C.P., 512; *Ware v. Cann*, 10 B. & C., 433; *Holmes v.*

Godson, 8 DeG. M. & G. 152; *Shaw v. Ford*, L. R. 7 Ch. D. 669; *Jarm. on Wills*, 4th ed., vol. 2, p. 14.

T. S. Plumb, for the defendants, children of the plaintiff. The word "children," in this will, is a word of purchase and not of limitation. The plaintiff, consequently only takes a life estate, with remainder to his children as tenants in common in fee. The only case where the word "children" is construed as a word of limitation is when the devisee has no children living at the date of the devise: *Wild's case*, 1 Tudor's L. C. 3rd ed., p. 669; *Guthrie's Appeal* 37 Penn. 9; *Bouverie v. Bouverie*, 2 Ph. 349; *Jarm. on Wills*, 5th Am. ed., vol. 3, p. 174 and 176. It is, in this view, unnecessary to consider whether or not the clause restraining alienation is good as a restraint upon alienation, it is rather to be considered as a clause limiting the estate to be taken by the plaintiff, and its effect is to cut down the estate in fee, apparently given to the plaintiff, to a life estate. *Jeffrey v. Scott*, 27 Gr., 314 is expressly in point.

J. Bethune, Q. C., in reply. *Wild's Case* does not apply. If the plaintiff took a mere life estate, as contended by the other side, then the defendants only take a life estate in the remainder, and there is an intestacy as to the fee. Such a construction the Court should not readily adopt. By the construction contended for by the plaintiff the whole estate is disposed of, and that is to be preferred where the will is doubtful.

January 27th, 1883. *Boyd, C.*—I have difficulty in defining precisely the manner of the testamentary devolution of the estate in question in this case, because the construction of the will was not argued with reference to that specifically; but, upon the general question presented on the pleadings, I have come to the conclusion that the plaintiff cannot, by his own conveyance, confer an indefeasible estate upon the intending purchaser. The will was made in 1866, at which time the testator's son John had several children who are yet alive. Some have been born subsequently to

the will, but as a class they were then existing. The testator wrongly describes the land in question as being in the seventh concession of York, while it is, in fact, in the second concession. There is no seventh concession in the township of York, and the property is otherwise sufficiently identified as being his farm on which he lived. The only clause relating to the land in question reads as follows, (the learned Chancellor read the clause above set out). The internal evidence supplied by this language, indicates that the will was the production of a draftsman unlearned in the law. The limitation of the land is to "John Dixon, to his heirs and executors." The inartistic expedient of prohibiting mortgaging or selling, is employed with a view to keep the farm for the use of his children after his death. The clear intention of the testator is, while giving the farm to his son, to provide "that it shall be to his (the son's) children after his decease." The first words give unquestionably an estate in fee simple absolute to the plaintiff. The last words as plainly declare, without resorting to technical language, that the son's children are to have the place after their father dies. The whole of the clause is to be read together, and if possible, effect is to be given to every part of it. If there is to be any preference in regard to conflicting limitations, the leaning of the Court should be in favour of that which is last.

Of possible constructions, the following have the most to commend them and, while it is not needful for me to decide on any one in particular, they all agree in manifesting an interest in the children of the plaintiff, which is the point I now decide as being sufficient for the disposal of the matter in controversy.

(1.) Full effect can be given to all the words by holding that there is an estate in fee vested in the plaintiff, but subject to be defeated by executory limitation to his children after his decease, if any survive him. This would enable the plaintiff to convey in fee simple, but subject to defeasance if he predeceased his children. *Barker v. Barker*, 2 Sim. 249; *Spence v. Handford*, 4 Jur. N.S., 987. (a)

(a) Also reported 27 L. J. N. S. (Ch.) 767.

(2.) The earlier technical words "to his heirs," may be rejected as being used ignorantly, or in misapprehension of their effect. This would cut down the first devise to one of a life estate only, and would vest the remainder in fee in the children, as tenants in common: *Sherratt v. Bentley*, 2 My. & K. 149. Such was the conclusion arrived at in a very tenaciously argued case, which came twice before the Supreme Court of Pennsylvania, *Urish v. Merkel*, 81 Penn. 332, in 1876, and *Urish's Appeal*, 86 Penn. 386, in 1878, in which the provisions were almost identical with those in the case now in hand.

Or (3.) It may be held that the effect of the latter words is to intercalate a life estate of the children between an estate for life in the plaintiff and the ultimate remainder in fee, vested in him by the first words of the clause. Such appears to have been the decision in *Chycke's Case*, as reported in 3 Dyer 357a. The devise was of the "fee simple of my estate to B. and after her decease to her son C." It was held that B. had an estate for life, remainder to her son C. for his life, and the fee simple thereafter to B. In the note it is said that Bendloe and Anderson both report this case as adjudged that C., the son, shall have the fee after the life estate of the mother determined. See also *Doe d. Herbert v. Thomas*, 3 A. & E. at p. 128, where *Chycke's Case* is referred to with approval by Littledale, J.; *Doe d. Amlot v. Davies*, 4 M. & W. 599; and *Gravenor v. Watkins*, L. R. 6 C. P. 505.

At present I am inclined to regard this last as the preferable construction.

The plaintiff should pay the infants' costs.

A. H. F. L.

[CHANCERY DIVISION.]

RE CASNER.

Will, construction of—Shelley's Case—Condition repugnant to the gift.

A testator devised as follows: (1) I will and direct that all my just debts and funeral expenses be paid by my two sons, A. & B., share and share alike, and I hereby charge the estate hereinafter devised to them with the said payments * * (3.) I give and devise unto my son B. the north part of lot 24, to have and to hold unto the said B., his heirs and assigns to and for his and their sole and only use forever * * (6.) I desire it should be distinctly understood that the property hereinbefore devised unto my two sons, A. & B., is to be held by them only during their life times and then to become the property of their heirs, and that they, my said sons, shall have no power to convey or dispose of the said lands in any manner whatever. *Held*, that the rule in *Shelley's Case* applied, and B. took an absolute and unconditional estate in fee simple, and that the limitations contained in clause (4) were void as repugnant to the estate devised by clause (3) and unreasonable.

WILLIAM CASNER, by his last will and testament, dated 23rd April, 1868, devised as follows: "(1.) I will and direct that all my just debts and funeral expenses be paid by my two sons Aaron Casner and Albert Casner, share and share alike, and I hereby charge the estate hereinafter devised to them with such payments * * (3.) I give and devise unto my son, Albert Casner, the north part of lot number twenty-four, in the ninth concession of the aforesaid township of Burford, containing fifty acres, more or less, to have and to hold unto the said Albert Casner, his heirs and assigns to and for his and their sole and only use forever * * (6.) I desire it should be distinctly understood that the property hereinbefore devised unto my two sons, Aaron and Albert, is to be held by them only during their life times, and then to become the property of their heirs, and that they, my said sons, shall have no power to convey or dispose of the said lands in any manner whatever."

Albert Casner contracts to sell the lands mentioned in the third paragraph of the will to one Henry Platt Matthews. The purchaser objected to the title upon the ground that the sixth paragraph of the will operated so as to give only a life estate in the said lands to Albert

Casner subject also to forfeiture upon alienation. Albert Casner thereupon filed a petition under R. S. O. Ch. 109. sec. 3, praying that it might be declared that he took an estate in fee simple absolute for his own use in the lands in question, and that the conditions in the sixth paragraph of the said will were void as repugnant to the estate devised by the third paragraph of the will, and as unreasonable.

The petition was heard on May 22nd, 1883, before Proudfoot, J.

C. T. Beck, for the vendor. The rule in *Shelley's Case* applies, and the vendor takes a fee simple under the will notwithstanding any intention to the contrary which may be gathered from the sixth paragraph of the will. An express declaration that the rule is not to apply is nugatory. *Tud. L. C.* 3rd ed., pp. 589, 605, 606; *Jarm. on Wills*, 4th ed. vol. 2, p. 338; *Leith's Blacks.* 2nd ed. p. 176. The condition against alienation is void, being an absolute restraint upon a tenant in fee against any manner of alienation, and is repugnant to the estate devised: *Lario v. Walker*, 28 Gr. 216. The cases in which a condition against alienation has been held good are all distinguishable: *Gallenger v. Farlinger*, 6 C. P. 512; *Pennyman v. McGrogan*, 18 C. P. 132; *In re Macleay*, L. R. 20 Eq. 186; *Armstrong v. McAlpine*, 4 A. R. 250; *Earls v. McAlpine*, 27 Gr. 161, *S. C.* in App. 6 A. R. 145; *Attwater v. Attwater*, 18 Beav. 330; *Renaud v. Joseph Guillet*, L. R. 2 P. C. 4; *Ware v. Cann*, 10 B. & C. 483; *Willis v. Hiscox*, 4 M. & C. 197.

W. S. Gordon, for the purchaser. The rule in *Shelley's Case* does not apply, and the vendor takes only a life estate. This is clearly the intention of the testator, as gathered from the whole will, and takes the case out of the rule: *Jarm. on Wills*, 4th ed, vol. 1 p. 472. The condition against alienation is good, being for the purpose of better securing the payments of the debts out of the real estate: *Earls v. McAlpine*, 6 A. R. 145; *Jeffery v. Scott*, 27 Gr. 314.

[PROUDFOOT, J., referred to *Dickson v. Dickson*, 19 U. C. L. J. 72. (a)]

Beck, in reply. In *Dickson v. Dickson*, there was an executory devise over on the death of the first devisee to his children. The case has no application.

May 23rd, 1883. PROUDFOOT, J.—I think the vendor took an estate in fee simple in the lands devised to him under the will of William Casner, notwithstanding the provision of the sixth paragraph, and that the condition against alienation is void.

A. H. F. L.

(a) Reported *supra*, p. 278.

[CHANCERY DIVISION.]

MERCHANTS' BANK OF CANADA V. HANCOCK ET AL.

Company—Raising money on warehouse receipts—Ultra vires—Banking Act—43 Vict., c. 22—Locus standi of execution creditors—Interpleader—Directors—By-law—R. S. O. c. 150.

Where, in a sheriff's interpleader, the M. Bank claimed the property in question as security for advances made by them to a certain company incorporated under R. S. O. c. 150, by virtue of warehouse receipts covering the property, and deposited with them by the said company as such security. Under R. S. O. c. 150, s. 28, "The directors shall have full power in all things to administer the affairs of the company, and may make * * * any description of contract which the company may, by law, enter into; and by subs. 2 of sec. 30 of that Act express power is given to the directors under the sanction of a by-law approved of by not less than two-third in value of the shareholders to hypothecate and pledge the real and personal property of the company to secure any sum borrowed, &c. There was no by-law in this case, but the board of directors was well aware of the nature and extent of the transaction with the bank and the hypothecation of the goods, and adopted what was done.

Held, that the property in the goods passed to the bank, and inasmuch as the company could not have resumed possession thereof without satisfying the bank's lien, neither could the execution creditors, who had no higher rights as to property seized than the original debtor.

Held, also, that even if a by-law were, strictly speaking, requisite in such a case, yet, where no complaint had been made by the company, or any of its shareholders, because of any irregularity or informality in what was done, as was the case here, an execution creditor could not be allowed to interfere, there being no imputation of fraud or illegality in its broad and culpable sense.

Held, however, upon the evidence in this case, the depositing of the goods in a warehouse, and the raising of money upon the security thereof, seemed to be an important constituent for the successful prosecution of the company's business, and to be such a matter as would fall within the competence of the directors to cause to be done through their manager, as was the course of dealing here.

THIS was an interpleader issue. The Merchants Bank of Canada affirmed and the defendants denied that certain goods and chattels, seized in execution by the sheriff of the county of Wentworth, pursuant to writs of *fiery facias* issued upon certain judgments obtained by the defendants against the Hamilton Knitting Company, were or some part thereof was at the time of the said respective seizures the property of the said Merchants Bank of Canada, to the extent of the advances made by them upon the several cases, sacks, bales, and bags of the said goods and

chattels respectively upon warehouse receipts thereof, and claimed by the said Merchants' Bank of Canada as against the defendants, or either of them.

The following were the material facts:

The Hamilton Knitting Company (Limited), incorporated under the Ontario Joint Stock Companies letters patent Act, R. S. O. c. 150, discounted certain promissory notes with the Merchants Bank at Hamilton and deposited as collateral security warehouse receipts covering goods in the warehouse of a warehouseman in that city. The transactions with the bank were carried on by Mr. Sweet, the manager, and one of the directors of the company, and the evidence showed that the board of directors had knowledge of all the transactions, and made no objections to the manager's method of raising money. The money thus obtained was required for wages, purchases of supplies and for the general purposes of the company, and was so used. The company were insolvent when the advances were made.

No by-law under the provisions of R. S. O., Cap. 150, sec. 30, or otherwise had been passed by the shareholders authorizing the pledging of this property.

The issue was tried at the Chancery sittings at Hamilton on October 2nd, 1883, before Boyd, C.

E. Martin, Q. C., and E. E. Kittson, for the plaintiffs: This is a trading corporation and under R. S. O. cap. 150, sec. 28, the directors have power to enter into any contract on behalf of the company, and these transactions are within the meaning of this section. Notice to all the directors has been shewn, and they cannot deny the validity of the contract. Sec. 29 gives the directors power to pass by-laws "for the conduct of the affairs of the company," and Sweet had been duly authorized under this to conduct the financing of the company, and this contract is binding on the company under sec. 51.

As to the Bank's power to take the security, we refer to 34 Vic. ch. 5, secs. 41, 45, 46; 43 Vic. ch. 22, sec. 7, and to *Smith v. Merchants' Bank*, 8 A. R. 15; we also cite

Commercial Bank v. Bank of Upper Canada, 7 Gr. 250; *Brice on Ultra Vires*, 2nd ed., pp. 264, 270, 275; *In re Patent File Co. Ex parte Birmingham Banking Co.*, L. R. 6 Ch. 83; *In re Hamilton's Windsor Iron Works*, L. R. 12 Ch. D. 707; *Renter v. The Electric Telegraph Co.*, 6 E. & B. 341; *Currier v. Ottawa Gas Co.*, 18 C. P. 202; *In re Bonelli's Electric Telegraph Co., Collie's Claim*, L. R. 12 Eq., 246.

Tilt, Q.C., E. Furlong, A. D. Cameron, and W. F. Walker, for various execution creditors. The charter of the company gives them no power to give warehouse receipts, and if these transactions are not within the provisions of their charter, they are *ultra vires* the company, and the plaintiffs must fail. The bank is bound to ascertain that securities are properly given. This is a pledging of the personal property of the company, and no by-law has been passed by the shareholders under the provisions of R. S. O. ch. 150, sec. 30. The manager has no power to bind the company in the way suggested, and his authority must be proved: *Taylor v. Cobourg, &c. R. W. Co.*, 24 C. P. 200. Some of the renewals of the notes were not discounted on the very day the old notes fell due. The bank's security was therefore gone. These transactions were *ultra vires* the manager or directors, unless authorized by R. S. O. ch. 150, sec. 30: *Balfour v. Ernest*, 6 C.B.N.S. 601. The warehouse receipts purport to be given under 34 Vict. ch. 5, which has been repealed, and are void: *Greenstreet v. Paris*, 21 Gr. 229, can be distinguished. As to the powers of a trading corporation, see *Pollock on Contracts*, 2nd ed., pp. 106, 107.

E. Martin, Q.C., in reply. This is a trading corporation and the manager has power to bind by contracts within the scope of their business. See *Story on Agency*, 9th ed., p. 57, sec. 53; *Pollock on Contracts*, 2nd ed., p. 133; *South of Ireland Colliery Co. v. Waddle*, L. R. 3 C. P. 463. In addition and beyond the powers conferred by R. S. O. ch. 150, sec. 30, a trading corporation has inherent power to borrow money for the purpose of its business, and pledge its assets for such advances: *Gibbs and West's Case*, L. R. 10 Eq. 312; *Pickering v. Ilfiacombe R. W. Co.*, L. R. 3 C. P. 235; *Bick-*

ford v. The Grand Junction R. W. Co., 1 S. C. 696; *English Channel Steamship Co. v. Rolt*, L. R. 17 Ch. D. 715; *Brice on Ultra Vires*, 2nd ed., pp. 130, 133, 134, 275. There was a ratification of the directors' act sufficient to bring it within *Phosphate of Lime Co. v. Green*, L. R. 7 C. P. 43. The goods having been in fact warehoused, and the receipts transferred to the bank for value, and the bills for which the goods were pledged having all been renewed before the executions issued, the bank thus acquired a lien thereon, and this distinguishes the case from *Smith v. Merchants Bank*, 8 A. R. 15, even if the 43 Vic. c. 22, be *ultra vires*, which it is contended it is not. The company could not have taken these goods without paying the bank's claim. The property has vested in the bank, and the execution creditors can be in no better position than the company, these transactions being *bond fide*, and no fraud shown. See also *McMaster v. Garland*, 8 A. R. 1; *Underlord v. Sharp*, L. R. 8 Eq. 501; *Pollock on Cont.* 2nd ed. p. 110, 115.

October 10th, 1883. BOYD, C.—Advances were obtained from time to time from the Bank for the general purposes of this company, and were so used in buying stock, paying wages, and otherwise in furtherance of the objects for which the company was incorporated. Promissory notes were given for these advances, and secured by the delivery and deposit of various warehouse receipts contemporaneously with each transaction. It was argued that these promissory notes were not properly signed so as to bind the company, but the provisions of the Banking Act render that immaterial. There was as to each transaction a valid debt incurred in the bank's favour under sec. 46 of 43 Vict. c. 22, which gives the bank the right to hold the receipts as collateral security. By that same provision, these receipts (being made directly to the bank in respect of goods, wares, and merchandize deposited by the company with the warehouseman Secord) in law operated to vest in the bank all the right and title of the company as

owners of the property in question. The owners who so dealt with the bank could not resume possession of the goods without satisfying the bank's lien, and execution creditors have no higher rights as to property seized in execution than the debtor himself has. But it is said that the company had no authority to deposit goods with a warehouseman, and did not, in fact, direct the giving of these receipts to the bank. The evidence sufficiently satisfies me that the board of directors was well aware of the nature and extent of the transaction with the bank, and the hypothecation of the goods in question, and adopted what was done. So that the whole matter resolves itself into one question whether this mode of doing business on the part of the company was *ultra vires* in such wise that no property could pass in and by the receipts held by the bank: *Riche v. Ashbury Railway Carriage and Iron Co.*, L. R. 7 H. L. 653. By the general act applicable to this company, R. S. O. ch. 150, sec. 14, every company incorporated thereunder shall forthwith become and be invested with all rights * * and with all the powers, privileges and immunities requisite to the carrying on of its undertaking. And by sec. 28 the directors shall have full power in all things to administer the affairs of the company, and may make, or cause to be made for the company, any description of contract which the company may, by law, enter into.

Sec. 30, sub-sec. 2 gives express power to the directors under the sanction of a by-law approved of by the vote of not less than two-thirds in value of the shareholders to hypothecate and pledge the real and personal property of the company to secure any sum borrowed for the purposes thereof. There was no by-law in this case, but no complaint is made by the company or by any of its shareholders because of any irregularity or informality in what was done. According to *Greenstreet v. Paris*, 21 Gr. 229, an outsider, such as an execution creditor, could not be allowed to interfere in such circumstances, and where there is no imputation of fraud or illegality in its broad and culpable

sense. But apart from this, the depositing of goods in a warehouse and the raising of money on the security thereof seems upon the evidence to be an important constituent for the successful prosecution of the company's business, and to be such a matter as would fall within the competence of the directors to cause to be done through their manager, as was the course of dealing in this case. See also the Interpretation Act, R. S. O. ch. 1, sec. 8 subsec. 24, and *Morawetz* on Priv. Corp. secs. 116, 164, 171, and 174.

My conclusion is, that the property in the goods passed by the warehouse receipts, and that the issue should be found for the plaintiffs.

A. H. F. L.

[CHANCERY DIVISION.]

THOMPSON ET AL. V. CANADA FIRE AND MARINE INSURANCE
COMPANY ET AL.

Company—Liability of Directors—Fraudulent transfer of shares to man of straw—Shareholders—Acquiescence—Laches—Standing by on chance of profit.

When the shareholders of a certain company brought action against the company and certain of its directors, alleging that the latter, being a majority of the directorate, had negotiated a transfer of a number of their own shares to one C., who subsequently became manager, knowing him to be a man of no sufficient means to pay calls thereon, but wishing to escape liability for certain impending calls; and claimed that the said directors should make good to the company or to them the amount of calls due upon the shares so transferred to C. and unpaid by him; and the said directors alleged acquiescence and *laches* on the plaintiffs part in respect of the matters complained of; and the plaintiffs proved the transfer as alleged:

Held, that the action of the directors was a breach of their duty and the transfer to C. invalid, except so far as it was subsequently ratified by the plaintiffs as shareholders.

Speaking generally, if any shareholder was aware of the transaction by which C. obtained the transfer of shares complained of, and became manager, and allowed the affairs of the company to be managed by him thereafter, taking the chance of prosperity attending his conduct of the business, then that passive acquiescence would preclude such a shareholder from afterwards contesting the validity of the transfer; but it was not the duty of the shareholders to investigate as to the action of the directors, and they had the right to say that the facts, if not communicated, were concealed from them. On the other hand, if they meant to dissent effectually from what was being illegally done, the shareholders were bound to take active and immediate measures to prevent or undo it. A mere protest would not be sufficient.

THIS was an action brought by a number of shareholders in the Canada Fire and Marine Insurance Company, against the said company and certain of the directors of the company, and one George Lee, who had formerly been a director, seeking to restrain the collection of a certain call upon the stock of the company, and other relief as hereinafter mentioned.

The statement of claim set up that the company was incorporated by 39 Vic., c. 51, and that they, the plaintiffs, had been shareholders thereof since 1876: that in January, 1880, the defendants, other than the company being then directors of the company were desirous of being relieved from further liability upon a very large amount of the

capital stock of the company held by them and for that purpose made a transfer of the principal portion of their shares in the company to one Charles Cameron, a person not of sufficient means to pay the calls to which said shares might become liable: that before making or agreeing to make the transfer, the said defendants had been informed by the manager of the company that in order to carry on the company's business successfully it would be necessary that a further call should be made upon the capital stock, and had reason to believe or apprehend that such call was then required to place the company in such a position financially as to warrant them in continuing the business of fire insurance, and such call was in fact then required for that purpose: that such transfer could not be made without the consent of the directors of the company, but the said defendants being a majority of the directors, against the will and notwithstanding the protest of the remaining directors of the company, consented in the name of the Board of Directors to such transfer of stock to the said Charles Cameron, while at the same time they refused to permit other shareholders of the company to transfer any of their stock; that the said defendants, except the defendant Lee, and Charles Cameron, had been directors of the company since such transfer to Cameron and forming a majority of the directors, had had the management and control of the affairs of the company, but the defendant Lee ceased to be a director after making the first call of 5 per cent. thereafter mentioned.

The plaintiffs then went on to allege that by certain fictitious transfers and re-transfers of the stock so transferred to Cameron, the defendant directors, had combined to deceive the Government of Canada and the Finance Minister, as well as the public and the shareholders, as to the true state of the affairs of the company, and to conceal the fact that so large an amount of stock was held by Cameron, and by such manipulations had succeeded in obtaining a renewal of the license of the company to transact the business of insurance in Canada, in 1881 and

1882, and they would not have obtained such renewal if they had represented the true condition of the company: that large loss had been incurred in carrying on the business of the company under the defendant directors, being a majority as aforesaid, since January, 1880, and the said defendants were liable to indemnify the plaintiffs against the payment of such losses, and to make good to the plaintiffs any calls which may have been made upon them in respect thereof: that the defendants had not been able to collect from the said C. Cameron any calls upon the stock of the company so transferred to Cameron, the latter having no means or property from which the same could be realized or collected, and the defendants, other than the company, were liable to pay to the company all calls made upon the stock transferred to Cameron, or to make good to the company, or to the plaintiffs any loss or deficiency occasioned by the non-payment of such calls: that the defendants recently collected from them the plaintiffs, a call of five per cent. made about February 7th, 1882, upon the stock held by them, such call having been in a considerable degree occasioned by Cameron's inability to pay any calls upon the stock transferred to him and also by losses incurred by unauthorized acts of the said defendants in the matter of insurance by the company, and having been paid by the plaintiffs under protest and after a threat of an action by the said defendants in the name of the company, such payment being made without prejudice to the right of the plaintiffs to call upon the said defendants other than the company to make good to them and the company the amount payable on the shares transferred to Cameron and in respect of the losses incurred as aforesaid: that in order to meet the deficiency in the assets of the company caused by the inability or failure of Cameron to pay the last mentioned call upon the stock so transferred to him, and also the losses incurred through the said unauthorized acts of the defendants, the defendants, as directors, had attempted to make a call of five per cent. upon the stock of the company payable on May 1st, 1883, and

had threatened to collect the same by action against the plaintiffs: that, owing to such threats, some of the plaintiffs had paid the said call without prejudice to their rights: that the said call of May 1st, 1883, had not been legally or properly made, and they, the plaintiffs, were not liable to pay it, but that if as between them and the company, they were liable to pay it, the defendants other than the company were liable to make good to them the amount so paid, and also so much of the previous call of five per cent. as was occasioned by the inability of Cameron to pay any call upon the stock transferred to him as aforesaid, or by losses incurred through the defendants' unauthorized acts.

The plaintiffs then set out the number of shares in the company held by them respectively, and the number of shares transferred as aforesaid to Cameron by the defendants, and claimed an injunction to restrain the defendants from collecting from the plaintiffs the call of five per cent. upon the capital stock of the company of May 1st, 1883, submitting to pay such call if adjudged liable therefor: that the defendants other than the company should respectively be ordered to pay to the company their several shares or proportions of the sum due in respect of the call made on or about February 7th, 1882, upon the shares of the capital stock of the company transferred to Cameron: that if the plaintiffs should be adjudged to be liable to pay to the company the last call of five per cent., viz., that of May 1st, 1883, upon their shares, the defendants other than the company should respectively be ordered to pay to the company their several shares or proportions of the sum due in respect of the said call upon the shares transferred by them to Cameron: that the said defendants should respectively be ordered to pay or make good to the company, or to the shareholders thereof, or to the plaintiffs, the several shares or proportions according to the amounts of stock transferred by them respectively as aforesaid of the loss or deficiency occasioned by the non-payment of said calls: that the defendants who had been directors of the company

since December, 1880, should be ordered to make good the losses sustained by the company since that time and to indemnify the plaintiffs against the same: further relief, and costs of suit.

The company by their statement of defence, set out that the transfers of stock to Cameron were duly entered in the books of the company, and that since the entry of such transfers the Directors had made two calls of five per cent. each, on the shares of the company: that the company had recovered judgment against Cameron for \$18,186.50, in respect of the first of these; calls that they claimed payment of the said calls from Cameron, and referred to the statement of defence of their co-defendants.

The defendants, other than the company, admitted the transfer of shares to Cameron, and his appointment, about January 1st, 1880, as Manager of the company, but denied that they knew him to be a man of no means, and denied all allegations of fraud, bad faith, mismanagement, and unauthorized dealings, and set up that the plaintiffs had acquiesced in what had been done, and in the acts complained of, and by their delay, *laches*, acquiescence in, and adoption of the proceedings complained of, had precluded themselves from now obtaining any relief in the premises, and submitted that it would be inequitable after the plaintiffs had thus adopted their proceedings, and allowed the defendants to act on such adoption, simply because the affairs of the company did not turn out as well as had been anticipated, to interfere in favor of the plaintiffs, to the detriment of themselves, who might have taken other steps for their protection, in case the plaintiffs had objected in due time to the course pursued by them.

The action was tried at the sittings of this Court at Toronto, on December 3rd, 4th, and 5th, 1884, before Boyd, C.

It appeared that the defendant company was, at the time of this action, in process of liquidation.

J. Bethune. Q.C., for the plaintiffs. Under 39 Vic. c. 51, sec. 6, D., the transfer of the shares could not be made without the consent of the directors. The power to transfer is a statutory one, and the question is, whether it has been well executed, if it has not it is void. On this part of the case I refer to *Aberdeen R. W. Co. v. Blaikie*, 1 Macq. 461; *In re Royal British Bank &c., Nicol's Case*, 3 DeG. & J 433; *Re Englefield Colliery Co.*, L. R. 8 Ch. D., 388; *Re Newcastle-on-Tyne Marine Ins. Co., Ex parte Henderson*, 19 Beav. 107; *Liquidators of Imperial Mercantile Credit Association v. Colman*, L. R. 6 H. L. 198; *Union National Bank v. Douglass*, 1 McCrary 86; *Wardell v. Railroad Company*, 103 U. S. 551. Again, the transfer in this case is voidable, being as it is a breach of trust. No inquiry was made as to the means of Mr. Cameron.

C. Moss, Q. C., on the same side. Without the votes of the directors, who are defendants, the transfer here would not have been carried. There is no doubt they committed a breach of their duty in respect to this transfer. There was no acceptance on the part of the shareholders of what had been done to preclude them from objecting now. There was no action on their part at the meeting where what had been done was sanctioned: See *re Exchange Banking Co. v. Flitcroft's Case*, L. R. 21 Ch. D. 519; *Bagshaw v. Eastern Union R. W. Co.*, 7 Ha. 129; *Hazard v. Durant*, 11 Rhode Island 195; *Kent v. Quicksilver Mining Co., Daniel Drew et al.*, 78 N. Y. 159; *National Provincial Marine Ins. Co., Gilbert's Case*, L. R. 5 Ch. 559; *National and Provincial Marine Ins. Co., ex parte Parker*, L. R. 2 Ch. 685; *Weston's Case*, L. R. 6 Ex. 238; *Re Imperial Mercantile Credit Association, William's Case*, L. R. 9 Eq. 225.

Dalton McCarthy, Q.C., for the defendants other than the company. The question is as to the power of the directors to do what was done as a matter of law; and the question whether it was wisely done or discretely done is but a modification of the same question. We say the transfer was legal and proper. The doctrine of trusteeship in re-

spect to directors is to be much qualified. They are not strictly trustees, but agents: *Smith v. Anderson*, L. R. 15 Ch. D. 247. It is necessary for directors to be shareholders to some extent. See *re Agriculturist Cattle Ins. Co., Bush's Case*, L. R. 6 Ch. 246. The transfer here can only be impeached on grounds which show it ought to be set aside, as being voidable; but it is not sought to set aside the transfer in this action. At any rate it would be monstrous to allow the plaintiffs who have adopted and ratified what was done, now to intervene. Many of them are disqualified from attacking the transaction, and were aware of the meeting sanctioning the transfer. Those who were at the meeting should have testified as to what they heard about it. I refer to *Ex parte Chippendale, re German Mining Co.*, 4 DeG. M. & 19; *Buckley on the Companies Acts*, 4th Ed. p. 447. This action, moreover, cannot be maintained except by the desire of the company. It relates to a matter of internal economy, which the Court will not interfere with. See *McMurray v. Northern R. W. Co.*, 22 Gr. 476; *Spackman v. Evans*, L. R. 3 H. L. 171; *MacDougall v. Gardiner*, L. R. 1 Ch. D. 13; *Burt v. British National Life Association*, 4 DeG. & J. 158; *Duckett v. Gover*, L. R. 6 Ch. D. 82; *Mason v. Harris*, L. R. 11 Ch. D. 97.

Laiillaw also appeared for the defendants other than the company.

Teetzel, for the company and the liquidator: The liquidator is content to stand by the position of affairs as they now are. The contributories have a right to ask the direction of the Court to guide the liquidator.

McKelcan, Q. C., for the plaintiffs, in reply, cited *Joint Stock Discount Company v. Brown*, L. R. 3 Eq. 381; *Simm v. Anglo-American Telegraph Co.*, L. R. 5 Q. B. D. 188; *Knox v. Gye*, L. R. 5 H. L. 656; *Lindsay Petroleum Co. v. Hurd*, L. R. 5 P. C. 221; *Campbell's Sale of Goods and Commercial Agency*, 1st ed., pp. 558-9; *Mason v. Harris*, L. R. 11 Ch. D. 97; *Attree v. Hawe*, L. R. 9 Ch. D. 337;

Hodgkinson v. The National Live Stock Insurance Co.,
26 Beav. 473.

At the close of the argument the learned chancellor gave judgment provisionally, that there should be a declaration for the guidance of the liquidator that the defendant directors were liable to all shareholders who did not know or acquiesce in, or ratify the transfer of shares to Cameron, and that there should be no costs on either side.

Afterwards he gave judgment as follows:

January 14th, 1884. BOYD, C.—I have already determined that the action of the defendants in transferring their shares while they were directors and trustees for the body of shareholders, to a person who was practically of no substance, and who could not have paid any call upon the shares was a breach of their duty and invalid, except in so far as their action was subsequently ratified by the shareholders who are now seeking contribution from them. Each case will depend on its own evidence, but speaking generally I am of opinion that if any shareholder was aware of the transaction with Cameron by which he became manager, and obtained the transfer of stock now impeached, and allowed the affairs of the company to be managed by him thereafter, taking the chance of prosperity attending his conduct of the business, then that "passive acquiescence" (to use Lord Cranworth's expression in *Spackman v. Evans*, L. R. 3 H. L. 193), would preclude such a shareholder from afterwards contesting the validity of the transaction: *Gregory v. Patchett*, 33 Beav. 595; *Walford v. Adie*, 5 Ha. 112.

The liquidator will have to determine in each particular case whether knowledge of the transaction is brought home to the different shareholders, and whether thereafter there was the lying by to await results, which would be tantamount to an affirmance of what was done. It was not the duty of the shareholders to investigate as to the action of the directors, they have the right to say that the facts if

not communicated were concealed from them : *S. C.* p. 196 ; knowledge must be established either expressly, or by necessary implication before the presumption of acquiescence can be raised : *Ib.* 234.

I do not think that a mere protest uttered by any shareholder on being made aware of what was done would protect him from the consequences of remaining inactive thereafter. That is the view of Lord Cairns in *Evans v. Smallcombe*, L. R. 3 H. L. 256. If a shareholder means to dissent effectively from what is being illegally done he should take active measures to prevent it or undo it. If he does not elect to oppose it at the outset, he cannot come forward at a later period when by the lapse of time, and the prosecution of the business by a new executive, the aspect of affairs has been changed for the worse. He cannot cure his inaction by mere expression of verbal dissatisfaction, and his conduct will debar him in equity from relief. See also *Clegg v. Edmondson*, 8 DeG. M. & G. 814, from which I extract the words of Knight Bruce, L. J., as not inapplicable to the circumstances of this company who were engaged in the prosecution of a speculative business : " In such cases a man having an adverse claim in equity on the ground of constructive trust should pursue it promptly, and not by empty words merely. He should shew himself in good time willing to participate in possible loss as well as profit, and not play a game in which he alone risks nothing."

The company being in liquidation I can do no more than make a declaration in accordance with this, and my former judgment, and give no costs for the reasons assigned at the close of the argument.

A. H. F. L.

[CHANCERY DIVISION.]

BEATTY V. NORTH-WEST TRANSPORTATION COMPANY,
(LIMITED), ET AL.

Company—Purchase by company effected by preponderating vote of vendor—Rescission of contract—Directors—Shareholders—Trustee and cestui que trust—Sale of a director's property to the company of which he is a director.

The board of directors of a steamship company passed a by-law authorizing the purchase for the company of a certain steamship owned by one of the directors, and, at a subsequent meeting of the shareholders this by-law was confirmed, such result being attained by the votes of the owner of the steamer, who was the largest shareholder. The evidence showed an entire absence of fraud or unfair dealing.

Held, nevertheless, on action brought by a dissentient shareholder, that the sale must be rescinded, for the vendor's threefold character of director, shareholder, and vendor necessarily involved a conflict between duty and interest, and the rule of the Court is not to permit one so circumstanced to hold or exercise the balance of power in the conduct of a company's affairs, to the possible prejudice of any of the shareholders. *Quære*, whether the sale could have been interfered with if the majority had been obtained without the vote of the vendor.

That the directors of a company are in a fiduciary position, is plain beyond doubt, and

Semble, that in a case such as this ratification is required by every individual of the class constituting the *cestuis que trustent*. At all events, when a minority is sought to be bound, the vote must be by a disinterested majority.

Apart from all statutory regulations, the general law applicable to sales of a director's property to a company of which he is a director appears to be this: if the contract is agreed upon by a vote of the directors in which the vendor joins, the transaction will be altogether invalid until the matter has been brought before a general meeting of the shareholders and approved.

THIS was an action brought by Henry Beatty on behalf of himself and all other shareholders of the defendant company, except the defendants other than the company, against the North-West Transportation Company, Limited, James Hughes Beatty, William Beatty, John Edward Rose, Robert Laird, and John D. Beatty, seeking to rescind a purchase of a certain steamship by the company.

By his statement of claim the plaintiff alleged that he was then, and prior to the said purchase, the owner of 120 shares of the company: that the defendants, the company, were a company duly incorporated under the Canada Joint Stock Companies Letters Patent Act, 1869, and authorized

among other things to carry on business in Ontario, and to construct, acquire, navigate, and maintain any steam or other vessels for certain purposes, and the board of directors was the governing body thereof: that the defendants James H. Beatty, W. Beatty, J. E. Rose, and R. Laird, were directors and shareholders of the company, who, as such, voted for the purchase sought to be rescinded: that the defendant J. D. Beatty was one of the directors and shareholders of the company, who as such voted against the said purchase and was in the same interest with himself, the plaintiff, but refused to be made a party plaintiff: that the capital stock of the company consisted of \$300,000, divided into 600 shares of \$500 each: that prior to the purchase complained of, the defendant J. H. Beatty was one of the directors of the company, and owner of 200 shares of the company, and also of a certain steam vessel called the United Empire, and at the same time one Neelon was a director and president of the company and holder of 101 shares, and for a long time the defendant J. H. Beatty endeavoured to induce the company to purchase the said steam vessel, but in vain, whereupon he conceived the scheme of purchasing so much of the capital stock of the company as would give him a controlling interest therein for the purpose of enabling him to enforce the said purchase, and so secure personal advantage to himself: that thereupon he, the said J. H. Beatty, purchased from the said Neelon all his aforesaid shares, and so became owner of 301 shares, which was a majority of all the shares, whereby he acquired a controlling interest in the company: that in pursuance of the same scheme J. H. Beatty transferred five of his shares to the defendant Rose, and five to the defendant Laird, who accepted the same for the purpose of assisting him in furthering his said scheme, which they subsequently did: that J. H. Beatty, Rose, and Laird, who then held a majority of the shares, elected themselves directors of the company, and thereupon acquired the controlling power, and elected J. H. Beatty president, which position he had since retained: that subsequently at a meeting of the

directors, on February 9th and 10th, 1883, it was decided by a majority consisting of the defendants, J. H. Beatty, Rose, Laird, and W. Beatty, that the company should purchase the said steamship from the defendant J. H. Beatty for the sum of \$125,000 to be paid partly in cash, and partly secured by promissory notes and mortgages of the company, and accordingly on February 10th, 1883, a by-law was passed by the said majority of the directorate authorizing and directing such purchase : that in further pursuance of the said scheme a general meeting of shareholders was called, and held on February 16th, 1883, when the said by-law was presented for approval, and the defendant J. H. Beatty, holding 291 shares, and those in collusion with him, namely the defendants Rose, Laird, and W. Beatty, were present, and voted in favour of and passed a resolution confirming the said by-law, although their votes were the only votes cast in favour thereof and votes representing 289 shares of the company were cast by the plaintiff and various other shareholders of the said company against the said resolution : that accordingly the defendant J. H. Beatty, Rose, Laird, and W. Beatty, had, on behalf of the company, completed the said purchase on the terms of the by-law, and had paid over to J. H. Beatty, out of the funds of the company, \$18,000 as part payment therefor, and given security as aforesaid for the balance. And the plaintiff charged the fact to be that the defendants Rose and Laird acquired their respective shares at the solicitation and for the benefit of J. H. Beatty, who had always virtually controlled the shares held by them, and their voting in respect thereof : that the said purchase was not entered into by J. H. Beatty, Rose, Laird, and W. Beatty, on behalf of the company in good faith for the purpose of promoting the the best interests of the Company, but for the purpose of serving their private interests contrary to their duty to the company and stockholders : that J. H. Beatty held such a fiduciary relation to the company and its shareholders that it was not competent for him to deal with the company in the manner aforesaid : that in consequence

of the preponderating number of shares and votes held and controlled as aforesaid by J. H. Beatty, and those directors of the company acting in collusion with him, it would be useless and futile for the plaintiff or any shareholder of the company other than the said defendants to apply to the company to seek any of the remedies sought for in this action, and for the same reason it was impossible for the plaintiff or any such shareholder as aforesaid to take any steps within the company to remedy the grievance complained of. And he claimed that the said purchase of the steamship United Empire might be cancelled and set aside the money paid therefor repaid to the company, and any securities issued on behalf of the company on account thereof, vacated and set aside; an injunction restraining the defendants from making any further payment, or issuing any further security or taking any further step in pursuance of such purchase, and further relief.

By their statement of defence, the defendants other than J. D. Beatty said the steamship in question was purchased in the best interests of the company: that it was purchased at the actual cost price, including a sum for superintendence and interest during the period of construction; that the defendants Laird and Rose denied they became shareholders and directors in the company for the purpose of assisting the defendant, J. H. Beatty, in any scheme or under any arrangement with the said Beatty, and had exercised an independent judgment in relation to the purchase of the vessel by the company, and that J. H. Beatty had not in any wise attempted to control them in the performance of their duties as directors of the company, or their vote in respect of the said shares: that the purchase was made in good faith for the purpose of serving and promoting the best interests of the company, and was not entered into for the purpose of serving their own separate and private interests and advantages contrary to the duty which they owed to the company and its shareholders, and they denied all charges of improper conduct.

The plaintiff joined issue on the statement of defence.

The rest of the facts of the case sufficiently appear from the judgment.

The case was heard at Toronto, on December 21st and 22nd, 1883, before BOYD, C.

Bethune, Q.C., and *Marsh*, for the plaintiffs. A trustee who is entrusted to purchase, sell, and manage for others, undertakes in the same moment in which he becomes trustee not to manage for the benefit of himself; *Ex parte Lucey*, 6 Ves. 626. Directors of a company stand in this respect, in the same position as other trustees, and they must not acquire to themselves, while they remain directors, an interest adverse to their duty: *Benson v. Heathorn*, 1 Y. & C. 341. The company are entitled to the entire services and the advice of every director upon matters which are brought before the board for consideration, and this is the reason for the lastly mentioned rule, *S. C.* 341, 342. It is not sufficient that the company should get a good bargain, they are entitled to the best bargain which the whole of the directors acting in their interest could have obtained: *Beck v. Kantorowicz*, 3 K. & J., 230. The company are entitled not only to the benefit of the unbiassed judgment of each of their directors in the conduct of their business, but they are also entitled to a complete disclosure of all the circumstances surrounding every business transaction, which disclosure could not be expected from a director were he allowed to traffic with his company, and this is another reason for the disability which attaches to a director's position: *Arthurton v. Dalley*, 2 Gr. 8; see also *Imperial Mercantile Credit Association v. Coleman*, L. R. 6 Ch., 567-8. The disability of directors in this respect is also shown by *City of Toronto v. Bowes*, 4 Gr. 489; *S. C.*, in App. 6 Gr. 1; *Pearson v. Concord R. W. Co.*, 28 Alb. L. J. 366; *Aberdeen R. W. Co. v. Blaikie Bros.*, 1 Macq. 461; *Davoue v. Fanning*, 2 Johns. Chy. R. (N. Y.) 263. Such a transaction as the present in order to become valid and binding, must be ratified by the shareholders: *Foss v. Harbottle*, 2 Ha. 493. A mere majority of the shareholders

will not be sufficient to make it valid: *Mason v. Harris*, L. R. 11 Ch. D. 97. This is because the directors are trustees not merely for the company but also for the stockholders: *The Great Luxemburgh R. W. Co. v. Magnay*, 25 Beav. 586; *Land Credit Co. of Ireland v. Lord Fermoy*, L. R. 8 Eq. 11. Every one of the *cestuis que trust* must ratify the transaction, otherwise it will be open to attack: *Cumberland Coal Co. v. Sherman*, 30 Barb. 577; *York and North Midland R. W. Co. v. Hudson*, 16 Beav. 495. Even though a majority might ratify the sale in question that majority must not be made up in any part of votes given in respect of the stock of the director whose conduct is attacked: *Re London and Mercantile Discount Co.*, L. R. 1 Eq. 284. We also refer to *Foster v. Oxford &c. R. W. Co.*, 13 C.B. 200; *Coleman v. Imperial Mercantile Credit Association*, L. R. 6 H. L. 189; *Thomas, Trustee v. Brownville, Fort Kearney and Pacific R. W. Co.* 2 Fed. R. 877; *Flint and Pere Marquette R. W. Co. v. Dewey*, 14 Mich. 478; *Pierce on Railways*, 2nd ed., p. 36, 39; *Hazard v. Durant*, 11 Rho. Is. 195; *Union National Bank of Chicago v. Douglass*, 1 McCr. 86; *Wardell v. Railroad Co.*, 103 U. S. 651; *Re Englefield Colliery Co.*, L. R. 8 Ch. D. 388; *Thomson's Liability of Directors*, 1st ed., p. 384; *Pender v. Lushington*, L. R. 6 Ch. D. 75; *Menier v. Hooper's Telegraph Works*, L. R. 9 Ch. 350; *Robinson v. Smith*, 3 Paige 232; *East Pant du United Lead Mining Co. v. Merryweather*, 2 H. & M. 254; *Attwood v. Merryweather*, L. R. 5 Eq. 464, *n.*

C. Robinson, Q. C., for the defendants. The point is, was the contract one which could be ratified by a majority of shareholders? No importance attaches to its being brought before a directors' meeting; it might have been brought up at first before the shareholders. A shareholder is not a trustee for anyone; he votes in his own interest purely and simply. He can vote as he pleases on his own shares so long as he does not commit fraud, in the sense of a moral fraud. The argument of the plaintiffs amount to this, that the minority can control the majority,

and that in a matter of internal economy and not *ultra vires*. A shareholder has a right to vote, even if he is interested. The plaintiff is influenced by antagonistic motives and his dual position is to be regarded. *Faulds v. Yates*, 11 Am. R. 24, shows how far majorities may go, and how far they may control a company as they please. If a matter is carried by a man's own vote, it is a matter for jealous scrutiny, but no more, in the absence of corrupt or improper influence: *Mason v. Harris*, L. R. 15 Ch. D. 97. I also refer to *Smith v. Anderson*, L. R. 11 Ch. D. 274; *Brice on Ultra Vires*, 2nd ed., pp. 619, 620, 865; *Lindley on Partn.*, 4th ed., p. 548; *Buckley on Joint Stock Companies*, 4th ed. p. 436; *Thring's Law and Practice of Joint Stock Companies*, 4th ed. p. 92, 92; *Davidson v. Tulloch*, 3 Macq. 783; *Morawetz on Private Corp.*, sec. 354; *Greenstreet v. Paris*, 21 Gr. 232; *Hayle v. Plattsburg and Montreal R. R. Co.*, 54 N. Y. 314; *South Baptist Society of Albany v. Clapp*, 18 Barb. 35; *The Board of Commissioners of Tippecanoe Co. v. Reynolds*, 44 Ind. 409, S. S. 5 Am. Corp. Cas. 342.

J. Bethune, Q.C., in reply. There is no distinction now between *moral* and *constructive* fraud as regards the branch of the law in question. This is not a matter of internal economy. All the cases turn on this, that the matters in question are those with which directors had power to deal, and which were within their competence. There is a fallacy in saying that as a director a man could not do a thing, but as a shareholder he can. While a shareholder he is still a director, and cannot divest himself of that character in voting. If he *bond fide* resigned and gave up his position as director, he could then deal legally as a shareholder. I refer to 32-33 Vic. c. 13, s. 16; *Foster v. The Oxford &c., R. W. Co.*, 13 C. B. 200; *Pierce on Railroads*, p. 39; *Cobb v. Goodhue*, 11 Paige 113.

January 19th, 1884. *BOYD, C.*—Apart from all statutory regulations, the general law applicable to sales of a director's property to a company of which he is a director appears to be this: if the contract is agreed upon by a vote

of the directors in which the vendor joins, the transaction will be altogether invalid until the matter has been brought before a general meeting of the shareholders, and approved. That is the view of the Lord Chancellor in *Ernest v. Nicholls*, 6 H. L. C. 416, based no doubt upon the provisions of the 29th sec. of 7 & 8 Vict. ch. 110, which are however to this extent declaratory of the law.

I cite the language of Bacon, V. C., in *Chesterfield, &c., Colliery Co. v. Black*, 37 L. T. N. S. 740, (where the sale was sanctioned by a unanimous general meeting of shareholders), as a concise statement of principles applicable to this case, "Nothing" he says, "can be plainer nor more conclusively settled than that a person in a fiduciary relation is not at liberty to make a bargain and enter into any engagement with his *cestui que trust*, by which he can gain a profit, unless the transaction is perfectly fair in itself, and fully disclosed to the *cestui que trust*, and above all that there is no advantage taken, no deceit, no underhand dealing—to use the words of some of the cases—no misrepresentation. But subject to that restriction there is nothing that prevents a trustee from dealing with his *cestui que trust*. That the directors of this company were in a fiduciary relation is plain beyond doubt. If therefore the sale being made by two directors of the company to the company were open to any suspicions of any of the misconduct which has happened in many such like cases, of course it could not stand. On the other hand, if the transaction was in itself fair, if there was no conduct on the part of the trustees which could mislead the *cestui que trust*, if every disclosure which the nature of the case required was made, then I know no reason why the bargain is not as valid as if it had taken place between strangers." Such are the circumstances of the present transaction. All suspicion of fraud, or unfair dealings may be discarded, and the question resolves itself into one of purely equitable law. That is, whether, the purchase from the director having been submitted to the body of shareholders, and adopted by a majority of votes, it is open for the dissentient plaintiff to

undo the sale by the intervention of the Court. One important element to be considered is, that the majority was secured by reason of the votes upon shares held by the vendor, without which the result would have been adverse to the purchase.

The English Act already referred to permits the ratification of such contracts to be secured by the votes of a majority of the shareholders. The whole question in this suit is briefly this: is that the law here apart from any statute?

In *McDougall v. Gardiner*, L. R. 1 Ch. D. 21, L. J. James is thus reported: "Nothing connected with internal disputes between the shareholders is to be made the subject of a bill by some one shareholder on behalf of himself and the others, unless there be something illegal, oppressive, or fraudulent, unless there is something *ultra vires* on the part of the company, *quod* company, or on the part of the majority of the company, so that they are not fit persons to determine it." Such an action was instituted in *Mason v. Harris*, L. R. 11 Ch. D. 97, where the complaint was of actual fraud in a sale of property which the directors possessing the control of the company were carrying out against the wishes of the minority.

In *Gregory v. Patchett*, 33 Beav. 605, the Master of the Rolls, in dealing with the question as to the power of the majority to bind the minority, observes that it is difficult to define the limits of deviation which will justify the interference of the court. Each case must in truth depend upon the powers under which the directors act, and the peculiar facts proved by the evidence.

If any circumstances of fraud in its ordinary meaning were proved in this case, the plaintiff's right to relief would be clear. Apart from this what is his position? The transaction is one, being a sale of a vessel owned by one of the directors, which could not be carried out by the managing board, as the vendor is one of that board. Being a sale by a trustee to his *cestuis que trustent* it cannot be carried out without the consent of those beneficiaries:

Ex parte Moss, L. R. 14 Ch. Div. 394. Has that consent been given here so that the sale may be viewed as ratified by the company? The defendants rely upon the vote of the shareholders which gives a majority in favour of the transaction, and *that*, they say, is to be regarded as the voice of the company. The minority represented by the plaintiff contend that their right to object to the sale cannot be overborne by this vote, especially as the scale in favour of the purchase was turned by the vendor's own shares.

The cases cited and relied upon by Mr. Robinson do not go far enough to support his argument that the majority in this case must govern. *Pender v. Lushington*, L. R. 6 Ch. D. 70, decides that a shareholder's motives and interest in voting in a particular way cannot be a reason why his vote should not be taken by the chairman at a general meeting. So far as the question depends on legal rights he is entitled to cast his vote as he pleases, that being a right of property pertaining to the share. But Sir George Jessel carefully guards against giving any opinion as to the ultimate effect of shareholders' resolutions when carried by an interested vote, (p. 81). He decides that it is the duty of the directors to obey resolutions legal on their face, and passed by a majority of the shareholders. He does not decide what the right of the minority may be in any application to the Court, based on equitable considerations. To much the same purpose is the language of Wood, V. C., in *East Pant du United Lead Co. v. Merryweather*, 2 H. & M. 254, in which he was merely dealing with the right of interested shareholders to vote on the question of permitting the use of the corporate name in order to attack a transaction with the company, entered into by these shareholders for their own benefit. He does not determine what the right of the dissentients may be in such a case if they are obliged to sue, making the company a defendant. As a matter of fact relief was given to them in the subsequent history of that litigation in *Atwool v. Merryweather*, L. R. 5 Eq. 464, where it appeared that concealment and fraud had been practised in the sale of the property to the company.

The court has no power to direct a meeting to be called to ascertain the views of the company at which the corrupt or interested shareholders shall be debarred from voting—per James, L. J., in *Mason v. Harris*, L. R. 11 Ch. D. 97,—but the Court is not nevertheless helpless in protecting the right of the minority. The Court is able to investigate how the majority has been obtained, and in how far it is made up of votes of shareholders whose acts are impeached. The same Judge who decided the case in 2 H. & M., also laid it down in *Re London and Mercantile Discount Co.*, L. R. 1 Eq. 284, that in ascertaining the views of the real majority who were to control it would be reasonable to ignore or exclude such interested votes. The same principle was recognized in *Melhado v. Hamilton*, 29 L. T. N. S. 364, and *In re Wedgwood Coal and Iron Co.*, L. R. 6 Ch. D. 627, viz., that when a minority is sought to be bound, the vote must be by a disinterested majority.

I should feel great embarrassment in dealing with this case if the majority had been obtained without the vote of the vendor, in view of the remarkable expression of opinion by Sir George Jessel, in *Re Haven Gold Mining Co.*, L. R. 20 Ch. D. 151, that a majority of shareholders would have power to bind the minority by agreeing to waive or condone fraud in the promotion of a company, or a fraudulent representation in the prospectus.

In regard to enforcing contracts such as this upon unwilling beneficiaries, it is the policy of the law not to enter into details of their fairness or unfairness. As put in the *Aberdeen R. Co. v. Blaikie Bros.*, 1 MacQ. 461, “it obviously is, or may be, impossible to demonstrate how far in any particular case the terms of a contract have been the best for the interest of the *cestui que trust* which it was possible to obtain. It may sometimes happen that the terms on which a trustee has dealt or attempted to deal with the estate or interests of those for whom he is a trustee, have been as good as could have been obtained from any other person—they may even at the time have been better. But still so inflexible is the rule, that no inquiry on that

subject is permitted." My strong impression is that in such cases ratification is required by every individual of the class constituting the *cestuis que trustent*. The contrary was held by Lord Hardwicke in *Whelpdale v. Cookson*, 1 Ves. Sr. 9, and note in 5 Ves. 682; but that decision was disapproved of by Lord Eldon in *Ex parte Lacy*, 6 Ves. 628, as well as by Chancellor Kent in *Davoue v. Fanning*, 2 Johns. Ch. (N. Y.) 251, and has not been accepted as law subsequently. See cases collected in *Lewin on Trusts*, pp. 426, 435, 6th ed.

In a very recent case of *Re Pepperell*, 27 W. R. 410, Mr. Justice Fry held that the concurrence of all the beneficiaries was necessary to validate a transaction as between them and the trustee touching the trust estate. It is not necessary to decide this case upon this view of the law, because the facts carry it beyond any region of doubt. I refer to the result of the shareholders' vote, if the shares held by the vendor are ignored. Then the majority would be largely against the purchase, and if the vote of the director who was the owner of the vessel, and also the largest shareholder, could turn the scale, he would be virtually voting the company's assets into his own pocket, against the will of a majority of disinterested shareholders. His threefold character of director and shareholder, and vendor necessarily involves a conflict between duty and interest, and the rule of the Court is not to permit a man so circumstanced to hold or exercise the balance of power in the conduct of a company's affairs, to the possible prejudice of any of the shareholders.

The allegations of fraud and unfair dealings are not proved, and while I give judgment for the plaintiff I do so without costs. My judgment proceeds upon the ground that the vendor's fiduciary position incapacitates him from coercing the minority by means of a majority secured by his own vote in his own favour, without regard to the fairness or unfairness of the transaction.

There has been no valid ratification by the company, and the sale must be set aside, the vessel restored to the

· vendor and the profits made by her (if any) accounted for to him, he restoring to the company what was received as the price, and the profits made (if any). If desired a reference may be had on these points.

Mr. Bethune cited American decisions which support my conclusions. I refer to *Thomas v. Brownsville, &c., R. W. Co.*, 1 McCrary's R. 392; *Cumberland Coal and Iron Co. v. Sherman*, 30 Barb, 553.

A. H. F. L.

[CHANCERY DIVISION.]

RE SHAVER.

Will—Evidence—Errors in description—Quieting title proceedings—Infant heir-at-law—Jurisdiction of referee.

A testator, by his will, devised as follows: "I devise the south-west quarter of lot 5, concession 2 of Westminster, containing fifty acres, more or less, to H. P. S., his heirs and assigns, in fee simple." The evidence shewed that the testator did not own the south-west quarter of the lot, but did own the south-east quarter; that he and the devisees had lived on it for many years, and that he did not own any other part of the lot, except the fifty acres of the south-east quarter.

Held that the evidence was admissible to explain the error, and cause the will to operate on the south-east quarter.

The erroneous part of the description in a will may be rejected if there is enough left to identify the subject matter devised.

Summers v. Summers, 5 O. R. 110 distinguished.

Quære, whether an order made by the referee of titles barring the claims of an infant heir-at-law would have the effect of divesting the estate of the infant.

THIS was a petition of Horace Philemon Shaver, of the township of Westminster, in the county of Middlesex, praying that his title to the east-half of the south-half of lot 5, concession 2, in the said township of Westminster, might be investigated and declared under the Quieting Titles Act.

On the matter coming before the Referee of Titles, at Toronto, it appeared that all the heirs at law had quitted claim to the petitioner except three, two of whom were adults and one Ida Shaver, an infant. These three were

notified of the proceedings. One of the adults did not appear, and one put in a claim which the Referee barred by his order. The official guardian was appointed guardian *ad litem* to the infant, and had put in a claim on her behalf, which the Referee also barred.

The Referee found the petitioner entitled to a certificate, and presented the matter before Boyd, C. His Lordship, however, expressed a doubt how far the case was affected by the decision in *Summers v. Summers*, 5 O. R. 110; and also, whether, notwithstanding the infant was barred by the order of the Referee, her estate as heir-at-law was divested, and directed an argument before him.

The matter came up for argument on Monday, March 24th, 1884, before Boyd, C.

The facts are sufficiently stated in the judgment.

Sanderson, for the petitioner.

The following authorities were referred to. *Summers v. Summers*, 5 O. R. 110; *Re Callaghan*, 8 P. R. 474; *Ex parte Lyons*, 2 Ch. Ch. 357.

March 26th, 1884. BOYD, C.—The petitioner's title rests on a devise in the following words:—

"I devise the south-west quarter of lot No. 5, in the 2nd concession of Westminster, containing fifty acres more or less, to my son Horace Philemon Shaver, his heirs and assigns in fee simple." The evidence shews that the testator did not own the south-west quarter of the lot: he did own the south-east quarter, and he and the devisee had lived on it for many years. He did not own any other part of the lot 5 in the 2nd concession, except the fifty acres of the south-east quarter, and the question is whether evidence is admissible to explain the error and cause the will to operate on this land. The authorities shew that you may reject an erroneous part of the description if you have enough left to identify the subject matter devised. It is evident that the testator intended to devise the quar-

ter of this lot to his son, but he calls it by mistake the south-west instead of the south-east quarter. Omit the words, "south-west quarter," and you have left a sufficient description of what was meant. It would then read, "I devise to my son fifty acres of lot 5, in the 2nd concession of Westminster." Extrinsic evidence may be given to shew what fifty acres he owned of that lot, so as to localize and ascertain the quarter devised: *Bleakley v. Smith*, 11 Sim. 150; *Shardow v. Cotterell*, L. R. 20 Ch. D. 9; *Kean v. Drope*, 35 U. C. R. 421; *Wigram* on Wills, pp. 68, 367; *Re Callaghan*, 8 P. R. 415. There is no residuary devise in this case, and no injustice, can possibly result from rectifying what is beyond doubt an obvious blunder in the description. The case is widely distinguishable from *Summers v. Summers*, which was before my brother Ferguson.

The property in question was well devised to the petitioner, in my judgment, and he should get his certificate accordingly.

A. H. F. L.

[CHANCERY DIVISION.]

RE WINSTANLEY

AND

THE SOUTHERLY THIRTY-FIVE FEET OF LOT NO. 11, ON THE WEST SIDE OF JARVIS STREET IN THE CITY OF TORONTO, ACCORDING TO A PLAN OF LOT NO. 6, IN THE FIRST CONCESSION FROM THE BAY, BY J. G. HOWARD, P. L. S.

Vendors and Purchasers Act, R. S. O., ch. 109—Will—Construction—Devise in fee simple with limited restraint on alienation.

E. R. W. was a devisee under the will of her father R. B., of certain real estate in Toronto, the material parts of which will were as follows: "After the death of my wife I direct the said freehold and leasehold property to be for the benefit of my son R. and my daughters M. and E., their heirs and assigns, to be divided in the manner following." He then gave a part to the son R. and proceeded thus: "The freehold property I hold at present on Jarvis Street in this city, to be divided in two lots from Jarvis Street (to?) Mutual Street, the lot with the house to be given to M. L. to hold for her benefit during her natural life and to dispose of the same by will and testament only, the remaining lot thirty-five feet wide on Jarvis Street, running through to Mutual Street, I bequeath to my daughter E. R. and that she shall not dispose of the same only by will and testament, and if either of my said daughters shall depart this life without leaving issue, then and in such case the survivor shall be possessed of the share of the deceased sister." E. R. W. contracted to sell the property devised to her when the purchaser objected to complete the purchase on the ground that she had only a life estate in it. On an application under the Vendors and Purchasers Act, R. S. O., ch. 109. It was
Held that E. R. W. took an estate in fee simple, which was however restricted by a condition against alienation in any manner, except by a testamentary instrument and that such restraint was valid.

THIS was an application under the Vendors and Purchasers Act, R. S. O., c. 109, by Emily Rebecca Winstanley, formerly Emily Rebecca Brewer.

The petition set out that the petitioner had contracted to sell the above-mentioned property with other lands to Margaret Ann Carrick; and that the purchaser had objected to accept the title of the petitioner, on the ground that she had only a life interest in said property; that her father, Richard Brewer, died entitled to an estate in fee simple in said lot, having first duly made and published his last will and testament, and set it out in full.

The will is very fully quoted in the judgment of Proudfoot, J., and the clause of it under which the petitioner acquired title was as follows :

"The freehold property I hold at present on Jarvis street in this city to be divided in two from Jarvis street, Mutual street (*sic*); the lot with the house to be given to Martha Louisa, to hold for her benefit during her natural life, and to dispose of the same by will and testament only; the remaining lot, thirty-five feet wide on Jarvis street, running through to Mutual street, I bequeath to my daughter Emily Rebecca, and that she shall not dispose of the same only by will and testament; and if either of my said daughters shall depart this life without leaving issue, then and in such case the survivor shall be possessed of the share of the deceased sister."

The petition also set out that the petitioner's sister subsequently departed this life leaving issue her surviving, and submitted that an estate in fee simple vested in the petitioner under the above devise, and that the condition that the property should only be disposed of by will and testament is repugnant and void, and asked that it should be so declared.

The petition was first argued before Proudfoot, J.; but as the parties interested were desirous of obtaining the opinion of the full Court it was reheard, by way of appeal from his order, on February 26th, 1884, before Boyd, C., and Proudfoot and Ferguson, JJ.

J. H. McDonald, for the petitioner. The estate taken by the petitioner under the will is either an estate tail or an estate in fee simple, and in either case the condition against disposing except by will is repugnant and void; and so the petitioner is entitled to convey in fee simple. The purchaser's objection that she cannot do so is bad: *Little v. Billings*, 27 Gr. 353; *Travers v. Gustin*, 20 Gr. 106; *Tudor's L. C.*, 3rd ed., 972; *Dawkins v. Lord Penrhyn*, L. R. 4 App. Cas. 51; *Re Macleay*, L. R. 20 Eq. 186; *Earls v. McAlpine*, 27 Gr. 161—6 A. R. 145; *Smith v. Fraught*, 45 U. C. R. 484; *Ware v. Cann*, 10 B. & C. 433, 1 Sm.

L. C. 8th ed. 445; *Holmes v. Godson*, 8 DeG. M. & G. 152. What is meant by the will is an indefinite failure of issue, therefore an estate tail is created and cannot be restricted by such a condition.

W. N. Miller, for the purchaser. If the testator intended an estate tail, the restriction would be senseless; the will of the devisee would have nothing to operate on. The estate must be in fee, restrained by the condition, which is reasonable and therefore perfectly good: *Gray v. Richmond*, 2 S. C. R. 431. For the meaning of the words, "die without issue," see 2 *Jarman on Wills*, 4th ed., 510-513. The estate is an estate in fee simple, subject to be divested upon an event that has not happened and cannot now happen, one of the sisters having died leaving issue, and the other still living: *Pennyman v. McGrogan*, 18 C. P. 132.

June 19, 1884. *BOYD, C.*—The material parts of the Brewer will in question are as follows: "After the death of my wife, I direct the said freehold and leasehold property to be for the benefit of my son Richard and my daughters Martha and Emily, their heirs and assigns, to be divided in manner following." He then gives a part to the son, and thus proceeds: "The freehold property I hold at present on Jarvis street to be divided in two lots from Jarvis street (to ?) Mutual street; the lot with the house to be given to Martha, to hold for her benefit during her natural life, and to dispose of the same by will and testament only; the remaining lot, thirty-five feet wide on Jarvis street, running through to Mutual street, I bequeath to my daughter Emily, and that she shall not dispose of the same only by will and testament; and if either of my said daughters shall depart this life without leaving issue then and in such case the survivor shall be possessed of the share of the deceased sister." There are some subsequent provisions relating to the purchase of real estate, which is to be divided equally between his children, and as to which it is provided "that if either die without issue,

then his or her share to be given to the surviving child or children of mine;" and a subsequent provision, that should all his children die without issue then "one half of the property named in the will" shall go to his step-daughters and the other half to his brothers and sisters.

But, without considering the possible effect of this language upon the land in question (which was not argued), it is enough, in the view I take of the case, to deal with the former part of the will.

By the first words I have quoted there is a very clear disposition of the fee simple of this land to his daughter Emily. The point is, whether this is cut down to an estate tail by the provision made as to the land in case either sister dies without leaving issue. The context shews that this death without issue has reference to issue living at the decease of the sister who first dies, and an indefinite failure of issue is not contemplated. The will says, if either daughter dies without leaving issue, then the survivor (*i. e.* the sister who survives, a personal benefit to her being intended) shall take the share of the sister who dies.

Upon the case stated it appears that the sister Martha has predeceased the petitioner Emily, and that Martha has left issue who inherit her share; so that events have occurred which satisfy this clause and exhaust its applicability to detract from the fee simple which is first given. The possible executory devise upon the death of the petitioner before her sister has become impossible, and thereby the fee simple first limited has become absolute. That, I take to be the effect of the word "survivor," and the word "then," which does not in this will mean the same as the words "in such case" which accompany it. I refer "then" to the time of the death, and read the will as governed by *Greenwood v. Verdon*, 1 K. & J. 74; and *Forsyth v. Galt*, 21 C. P. 408, Gwynne, J., with whom, however, Strong, V. C., does not agree, as the case is reported in Appeal, 22 C. P. 115. See also *Jones v. Cullimore*, 3 Jur. N. S. 404; and *Taylor v. Walker*, 11 Jur. N. S. 723.

The use of the word "survivor" without any words of

limitation (of which the testator well knew the use, as appears by other parts of the will) is also significant, as indicating his intention to benefit the surviving sister personally. That intention is further manifested by the direction against alienation during the life of his daughter who should survive her sister. Upon the effect of "survivor" standing alone, I refer to the language of the Master of the Rolls, in *Massey v. Hudson*, 2 Mer. 134, and the comment thereon in 3 *Jarman on Wills*, 5th ed. (Am.) 334, in these words: "The restricted construction has prevailed in consequence of the use of the word 'survivor' in many cases where such survivor has taken a transmissible interest:" *Ranelagh v. Ranelagh*, 2 Myl. & K. 441.

The weight to be attached to this manner of expression is not got rid of by saying that, by the operation of the statute, the legal result is the same as if the benefit had been given in terms to the survivor, her heirs and assigns, and therefore that no significance should be attached to the omission of these words. That, no doubt, is the manner of construction which was adopted in *Little v. Billings*, 27 Gr. 353, but what the Court has to deal with in a question of this kind is the intention of the testator as expressed by him in what he has said rather than the legal operation of the will as read in conjunction with the statute. What I mean is admirably expressed in *Hasluck v. Pedley*, L. R. 19 Eq. 274, in this concise way, "the act does not affect the meaning of the will; it only alters its legal operation."

There is besides the further consideration to strengthen the conclusion that a fee simple is given, and not an estate tail that the testator intended his daughter to enjoy such an estate as could be disposed of by will, which an estate tail is not.

This being then an estate in fee simple the question is, whether the restraint on alienation is valid. According to the decisions by which I am bound, it is. In *Baker v. Newton*, 2 Beav. 112, the testator gave to her natural daughter, a *feme sole*, leasehold property for her own abso-

lute use without liberty to sell or assign during her life. Lord Langdale held that she took absolutely during her life. Sir George Jessel, in *Re Macleay*, L. R. 20 Eq. 189, using language which has been adopted as the correct rule by the Court of Queen's Bench in *Smith v. Fraught*, 45 U. C. R. 484, says, that "you may restrict alienation by prohibiting a particular class of alienation:" that "the test is whether the condition takes away the whole power of alienation substantially; it is a question of substance, and not of mere form."

In the case in hand alienation *inter vivos* is restricted, but alienation by will is permitted. The devisee may possess perfect freedom of enjoyment by leasing and the like during her life, but she cannot dispose of the remainder after her death except by testamentary instrument. If she does not choose to deal with it by will, the estate will of course descend to her heirs. This is but a limited restraint on alienation not extending beyond the life of a person in being, and is not obnoxious to the law against perpetuities: *Doe d. Mitchinson v. Carter*, 8 T. R. 57, and *Wilkinson v. Wilkinson*, 3 Swanst. 523. In *Cooper v. Macdonald*, 26 W. R. 379, James, L. J., observes during argument: "You may put any restriction you like against alienation of an estate in fee, so long as you do not violate the rule against perpetuities."

I had hesitation on this point, because of the commonly received view of the decision in *Ware v. Cann*, 10 B. & C. 433, which is found frequently to be cited for the proposition, that a qualified restriction aimed against any particular mode of alienation is as bad as if directed against alienation generally. That case was cited in *Re Macleay*, but was not commented upon by the Master of the Rolls, although he uses language at variance with its supposed scope. Upon examining the decision it will be found to be without reasons, merely the certificate of the Judges as to their conclusions upon the points submitted. But looking at the language of the will, the devise over which was held invalid, was to take effect "in case E. W. offers to mortgage

or suffer a fine, &c." The argument proceeds upon the ground that the prohibition of an *offer* or *attempt* is too vague and uncertain, and therefore void, and the holding of the Judges may not express more than the opinion that such a condition was void for uncertainty. I find that such an interpretation is given to the case in *Brothers v. McCurdy*, 36 Pa. St. R. 407.

PROUDFOOT, J.—This matter requires further consideration than I was able to give to it, when it came before me formerly.

Richard Brewer, by his will made on the 26th October, 1852, after giving to his wife all the household furniture, books, pictures, china, linen, and other goods and chattels, of which he might die possessed, for her use and benefit during the natural period of her life, and after her death to his daughters Martha Louisa and Emily Rebecca, share and share alike, proceeded to deal with his freehold and leasehold property which he might possess at his death, and gave it all to his wife to the intent only that she should take the rents and profits arising therefrom for her use and benefit, and for the maintenance and education of his children until they became of age or got married, after which his wife was to have £250 per annum and the freehold property he owned on Jarvis street, during her natural life, all above the £250 per annum and the rents and profits of the freehold property on Jarvis street to be divided equally among his children as soon as they became of age or settled by marriage, provided the property is all unincumbered, but if there are debts owing upon the said freehold and leasehold property, then his wife and executors to have the whole rents and profits of such property until such debts are liquidated, and after such liquidation, then his children to come in for the above named portion, either at marriage or when they may be of age. And after the death of his wife he directed the said freehold and leasehold property to be for the benefit of his son Richard Irevine and his daughters Martha Louisa and Emily Rebecca, their heirs and assigns

to be divided in manner following, that is to say—for his son Richard Irvine the leasehold property No. 3 in St. Lawrence block, and that he shall not have power to dispose of the same only by will and testament. The leasehold property on the corner of Yonge and Adelaide streets he directed for the benefit of his daughters Martha Louisa and Emily Rebecca, their heirs and assigns, share and share alike, and that they shall not dispose of the same only by will and testament. The freehold property he held then on Jarvis street to be divided in two lots, the lot with the house to be given to Martha Louisa, to hold for her benefit during her natural life, and to dispose of the same by will and testament only; the remaining lot he bequeathed to his daughter Emily Rebecca, and that she shall not dispose of the same only by will and testament; and if either of his said daughters should depart this life without leaving issue, then and in such case the survivor shall be possessed of the share of the deceased sister.

The testator then disposed of his interest in the business of Brewer, McPhail & Co., to his wife for life, but only to use the interest, except for paying for property on which he should owe debts at the time of his death, and for that purpose the whole might be used; if not all required for that purpose the balance to be invested in the purchase of real estate in Toronto, and divided equally between his children, which should not be disposed of except by will or testament, or if either die without issue then her or his share to be given to the surviving child or children.

The testator then gave to his wife the money arising from a policy of life assurance to be used in the same manner as the amount from the business of Brewer, McPhail & Co., namely, for the liquidation of debts on said property or for the purchase of real property for his children with the above provision not to dispose of the same during life.

And should all his children die without issue the one-half of the property named in his will should go to his step-daughters, share and share alike, the other half to his

brothers and sisters, share and share alike, or should his father or mother be alive, he directed that half the proceeds of said property as long as they shall live (shall be paid to them?) and then the half to go to his brothers and sisters as aforesaid.

The question is, whether Emily Rebecca can sell the lot on Jarvis street devised to her.

It will be seen that after providing for his wife by giving her a life interest in his personal, leasehold, and freehold property which he might own at his death or procured by investments of surplus rents and income, he proceeds to dispose of his freehold and leasehold property for the benefit of his son and daughters their heirs and assigns by giving one of the leaseholds to his son Richard Irvine, *and that he should not have power to dispose of it only by will and testament*, the other he gave for the benefit of his daughters Martha Louisa and Emily Rebecca, their heirs and assigns in equal shares *and that they should not dispose of the same only by will and testament*. The freehold property on Jarvis street he divided into two lots giving one to Martha Louisa to hold for her benefit during her natural life *and to dispose of the same by will and testament only*, the other to Emily Rebecca (without any words of limitation) *and that she shall not dispose of the same only by will and testament*, and in case either of his daughters should die without leaving issue, then and in such case the survivor should be possessed of the share of the deceased sister. The real estate that might be purchased with the money from Brewer, McPhail & Co., was to be divided equally among his children which *should not be disposed of except by will or testament*, or if either should die without issue his or her share to be given to the surviving child or children. And so with the real estate purchased with the life insurance money it was to be held in like manner for his children *with the above provision, not to dispose of the same during life*. The final disposition, in case of all his children dying without issue, in favour of his step-daughters and his brothers and sisters is made absolutely and without qualification.

The leading desire in the mind of the testator, was that his children should have no power of disposing of what they took under the will during their lives, but only by will or testament, repeated no less than six times. And effect ought to be given to this wish if it can be done consistently with the rules of law. At present we are only concerned with the share of Emily Rebecca in the freehold lot on Jarvis street, which differs in some respect from the other given to her sister.

The direction, that after the death of testator's wife the freehold and leasehold property was to be held for the benefit of his son and daughters *their heirs and assigns*, applies to the whole subsequent disposition of the divided property. We need not inquire of the effect of this language as to the leaseholds, nor as to its effect upon the devise to Martha Louisa, qualified by limiting it to her for life; but when he afterwards gives a lot on Jarvis street to Emily Rebecca without any limitation of estate, the previous expression makes it in express terms an estate to her, her heirs and assigns in fee with a restriction on the power to alienate during her life. But without the devise to her, her heirs and assigns, the restriction upon alienation that it should only be by will or testament, would also have the same effect, for in that case he meant to give an estate that could be alienated by will or testament, which would not apply to an estate tail which must devolve *per formam doni*, nor to an estate in fee with an executory limitation over, for in such case the first taker cannot by any deed or will affect or alter the nature of the estate.

In *Shailard v. Baker*, Cro. El. 744, a devise to James and Francis, and if either of them or their heirs do sell the same the gift of it shall stand void and so return to the whole heirs again, was held to pass a fee. The devise at that time to James and Francis only passed a life estate, but the prohibition to sell by them or their heirs, though void as being an absolute prohibition to alienate, shewed the intention to give an estate over which the heirs would have control. In the present case, even if the restriction

on alienation were void, it would have the effect of making the estate a fee, as indicating the intention that it might pass by will. For there is nothing to shew that Emily Rebecca was to have any lesser estate that might pass by will.

As to the indestructibility of an executory devise by any act of the first taker, Mr. Jarman, vol. 1, p. 828, 3rd ed., states the rule as follows: "The essential quality in executory devises, which gave to the distinction between them and contingent remainders its chief importance, was this, that such interests were and still are not in general liable to be affected by any alteration in the preceding estate."

Emily Rebecca, I suppose may, under recent legislation (R. S. O. c. 98, s. 5) convey her contingent interest, but that will not destroy the interest of those to take on her dying without issue.

It was argued, however, that Martha Louisa having died leaving issue, the contingency upon which the executory interest depended having failed, as by her death she cannot be the survivor of Emily Rebecca, the estate of the latter became absolute: *Jackson v. Noble*, 2 Keen. 590. This assumes that *survivor* is to be read in its ordinary sense. In the present case it ought to be read *other*, and the heirs of Martha Louisa would then be within the limitation. The limitation to the survivor is, "if either of my said daughters shall depart this life without leaving issue, then and in such case the survivor shall be possessed of the share of the deceased sister." The ultimate limitation is to take effect "should all my children die without issue." The rule applicable to such cases is stated by Mr. Jarman, vol. 2, p. 656, 3rd ed., as follows: "Where a gift to the 'survivors' of several legatees, limited to take place on a certain event (as the death of any of them under age or without issue) is followed by a gift over to third parties, not if there should be no survivor at the time the event happens, but if that event happens to every one of the legatees; * * the Courts will act by construing 'survivors' as 'others.' For, whereas by the strict construction, the former limitation

might obviously fail before the event happened upon which the ulterior gift was to take effect, by the more liberal interpretation the whole will becomes coherent, and the final disposition takes effect upon failure of the prior gift in continuation, as it were, of the testator's general scheme." Mr. Jarman cites *Doe d. Watts v. Wainewright*, 5 T. R. 427, where lands were limited, after previous life estates, to the use of the child or children of A. as tenants in common, and the heirs of their several bodies; and in case any such child or children should die without issue, then the shares of such as so died should remain to the use of the *surviving* child or children of A., and the heirs of their respective bodies; and in case all the said children should die without issue, or if A. should have no issue, then over; it was held, on the strength of the last clause, that the remainder to the *surviving* child or children, and the heirs of their bodies, carried a proportion of the share of a child who died without issue to the heirs of the body of a child who had previously died leaving issue: *Wilmot v. Wilmot*, 8 Ves. 10; *Cursham v. Newland*, 2 Bing. N. C. 58; *Lowe v. Land*, 1 Jur. 377; and *Cole v. Sewell*, 4 D. & War. 1, are to the same effect.

In the view I take of this case it is not, however, necessary to resort to this rule, for assuming that the estate of Emily Rebecca is freed from that contingency, it still remains subject to the qualification that she can only dispose of it by will—a restriction that I think perfectly valid.

We have now to consider the effect of the limitation to the survivor on death without issue.

If the dying without issue means in case of Emily Rebecca dying without issue at the time of her death, then her estate is an estate in fee with an executory limitation over, and in such case she could not dispose of an estate freed from the contingency, as we have seen. The will was made in 1852 and is not affected by the R. S. O., c. 106, ss. 7-31. And upon the import of these words as intending a general failure of issue, I have little to add

to what I said in *Little v. Billings*, 27 Gr. 353. Standing alone, I conceive they mean an indefinite failure of issue, and thus create an estate tail. Nor do I think that *Forsyth v. Galt*, 22 C. P. 115, is an authority against the general rule. That was a very peculiar case. It turned upon the effect of a devise over in the event of the testator's sons, Collingwood and others, or his daughters "dying before they came of lawful age, or without lawful issue," then the estate to be divided among the survivors. The interest of Collingwood was that in question. At the time of the making of the will he was twenty-seven years of age, and died afterwards without having been married. The Court of Appeal was very much divided as to what estate he took. Some of the Judges held that *or* was to be read *and*, and the double event having failed he took a fee. The majority were of a contrary opinion. Draper, C. J., seems to have held that the failure of issue referred to the death of Collingwood. Strong, J., was of a contrary opinion, and considered he took an estate tail. But he says it was immaterial which construction was adopted, as in either case the respondent was entitled to judgment. There were many circumstances in the case that might lead to the conclusion that the failure of issue was limited to a failure at death, some of which are mentioned in the case below, 21 C. P. 408, 416. The same will was in question in *Doe d. Forsyth v. Quackenbush*, 10 U. C. R. 148, when Burns, J., thought Collingwood's estate was an estate tail; the Chief Justice (Robinson,) that it was an estate in fee, subject to an executory devise over. But considering that it was immaterial which estate he had, the very peculiar circumstances of the case, and the great difference of opinion among the Judges who considered it, I do not think we can consider it as reversing the long train of authority that "dying without issue" means an indefinite failure of issue.

The reason assigned for cutting down a devise to a person and his heirs, by a clause that in the event of his dying without issue, over, to an estate tail, is that the

testator has by the words introducing the limitation over, explained himself to have used the word "heirs" in the preceding devise in the qualified and restricted sense of heirs of the body : 1 *Jarman on Wills*, 3rd ed., 519.

But that reasoning cannot apply to the present case, for the restriction upon all alienation except by will, shows that the testator did not mean to pass an estate that could not be devised, as an estate tail is. The attempt to devise over on failure of issue must therefore fail of effect, and must be deemed repugnant to the estate in fee.

The estate in fee is one that by the express terms of the will, Emily Rebecca was to have the power to dispose of by will ; the devise over is simply on dying without issue, but it must also plainly mean, and without having disposed of the estate by will, and then as to this latter clause, it is brought within the operation of *Gulliver v. Vaux*, 8 DeG. M. & G. 167. In that case the testator devised to his children successively in terms that carried a fee, but if they all died without issue and without appointing the disposal of the estate then over ; it was held that this condition or contingency annexed to the estate of the children and precedent to that of the devisees' estate was a void condition, and consequently the estate dependent on it could never take place.

In the present case there are really two conditions, one restraining alienation unless by will ; the other giving the land over in case the devisee does not devise it. The latter condition is void as repugnant to the estate in fee, as held in *Gulliver v. Vaux*, *supra*, for in case of intestacy the land would descend to the heirs, an incident attached by law to the fee, while the condition is that they shall not take unless devised to them.

The former condition is valid, not being an absolute prohibition of the power of alienation. If the condition does not take away the whole power of alienation substantially it is good. The alienation may be restricted by prohibiting a particular class of alienation, or by prohibiting it to a particular class of individuals, or by restricting it to a par-

ticular time, *Re Macleay*, L. R. 20 Eq. 186. In *Earls v. McAlpine*, 27 Gr. 161, a restraint upon devisees selling or transferring the property without the written consent of testator's wife during her lifetime was held good. *S. C.*, in App., 6 A. R. 145. In *Smith v. Fraught*, 45 U. C. R. 484 the restraint was that the devisee "shall not sell or cause to be sold the above named lot or any part thereof whatsoever during her natural life, but she shall be at liberty to grant it to any of her children whom she shall think proper," and it was held valid.

In the present case Emily Rebecca has an absolute power to dispose by will of her estate. There is no restriction in the persons to whom she may give it, and it is such a partial restraint on her disposing power as is warranted by the authorities. The observations made in regard to the first limitation on death without issue apply as well to the ultimate limitation of that kind. Neither of them can make an estate that cannot be devised, when the testator says it can.

My opinion is, that Emily Rebecca takes an estate in fee subject to the qualification that she can dispose of it by will only.

In this manner I think the oft repeated expression of the testator's wish may be gratified. I do not know why the testator imposed this restriction, but it is not an unreasonable one, and many causes may have concurred to lead him to the belief that the best mode of securing a competence for his children was to prevent them from making away with what he gave them during their lives.

FERGUSON, J., concurred.

G. A. B.

[QUEEN'S BENCH DIVISION.]

MACLEAN V. ANTHONY.

SLATER V. ANTHONY.

Sheriff—Interpleader—Abandoning goods—Attachment.

Under an execution in *McLean v. Anthony* the sheriff, on the 19th April, 1883, having seized the defendant's goods, sold them to one Ferguson, there being at the time rent overdue to the landlord. Ferguson did not remove the goods from the premises. By agreement between the landlord, the sheriff, and Ferguson, the latter retained sufficient of the purchase money to pay the claim for rent. Subsequently Ferguson sold the goods to one English, when it was arranged that English should pay the old claim for rent, and a further instalment which had meanwhile fallen due. The defendant then surrendered his term, and English became tenant. On the 23rd April, an execution in *Slater v. Anthony* was placed in the sheriff's hands, and he seized the same goods some time between 21st May and 23rd June. English having claimed the goods, the sheriff interpleaded, and an issue was directed which resulted in favour of Slater. Pending the interpleader issue the sheriff allowed the landlord's bailiff, who also claimed the goods for arrears of taxes, to sell them and pay the rent and taxes in arrear. At the conclusion of the interpleader issue it appeared that the sheriff had taken no security for the goods, and that English, the claimant, was worthless.

Held, that there being no claim either for rent or taxes which the sheriff was justified in acknowledging, he was liable to an attachment, on motion of his execution creditor, for disobedience of the interpleader order.

THIS was a motion for an order for a writ of attachment against the sheriff of Peterborough for contempt of an interpleader order, dated 31st August, 1883.

The alleged contempt was :

1. Disobedience in not taking security from the claimant English.
2. In not selling, no security being given.
3. Not paying proceeds of sale into Court.
4. Giving up possession of goods and allowing them to be sold by a stranger.

The facts and cases cited are stated in the judgment.

Aylesworth, for the motion.

Holman, contra.

July 9, 1884. ROSE, J.—The dispute here is between the sheriff and execution creditor, Slater. Slater has succeeded in his issue with English, a purchaser from one Ferguson, who purchased at a sale under execution in the suit of *Maclean v. Anthony*. Although successful he finds that the goods for which he has been contending have in the meantime been sold by a bailiff for the landlord and for taxes, and the proceeds have gone to satisfy these claims. He now seeks to make the sheriff liable, as the defendant and the claimants are both financially irresponsible. Unless his case against the sheriff is clear he should not succeed in this summary way.

Before further stating the facts I will state several propositions of law which seem clearly established.

1. That the Statute 8 Ann, ch. 14, sec. 1, does not require *the sheriff* to pay the rent to the landlord before removal. The words are, "that no goods * * shall be liable to be taken by virtue of any execution * * *unless the party at whose suit the said execution is sued out* shall, before removal of such goods from off the said premises by virtue of such execution or extent, pay to the landlord, &c.

2. The landlord has no claim under that statute for his rent unless and until removal without payment.

3. Therefore, if the goods be sold and remain on said premises the landlord's claim under the statute does not arise, because,

4. His right of distress is not taken away, and he may distrain after the sheriff withdraw.

5. The landlord may distrain after the sheriff sell the goods if they are not removed from the premises within a reasonable time.

6. If the sheriff remain an unreasonable time in possession before the sale, an action may lie against him even if the landlord may not distrain.

7. The sheriff is not bound to pay the landlord's claim for rent, and may call upon the execution creditor to do so, and if he will not may withdraw from possession.

8. He will not, however, be excused from seizing by reason of such a claim.

These propositions are, I think, clearly deducible from *White v. Binstead*, 13 C. B. 304; *Hughes v. Towers*, 16 C. P. 287; *Locke v. McConkey*, 26 C. P. 475, and cases cited.

Bearing these principles in mind, we find here that one John Garvey was the landlord of the defendant Anthony: that when the sheriff seized in *McLean v. Anthony* there was a claim for overdue rent of \$125, and without payment of which the goods could not be removed: that while the defendant was in possession a further quarter's rent of \$75 became due: that on the 17th April, 1883, the plaintiff sold the goods to one Ferguson, who did not remove them from the premises, but under agreement with the landlord and defendant continued in possession of the premises. There is no evidence of a change of tenancy from Anthony to Ferguson. By arrangement between the sheriff, Garvey and Ferguson, the sheriff, instead of requiring Ferguson to pay him the \$125 and paying the same to the landlord, Garvey, allowed \$125 of the purchase money to remain in Garvey's hands, he agreeing to pay the landlord that sum. It will be remembered that the sheriff was not bound to pay the landlord, the goods not being removed, but the landlord might distrain, and this agreement was therefore necessary to protect Ferguson. No arrangement seems to have been made as to payment of the \$75. Subsequently, (date not given) Ferguson sold to English, the claimant, when it was arranged that English should pay the \$125 and the \$75 which became due on the 10th of April, 1883, and he became tenant to Garvey at \$300 a year and continued in possession as such tenant. Thereupon the tenancy of Anthony ended, *i. e.*, was surrendered, as Anthony appears to have been a party to the arrangement, and entered into the service of English to sell the goods on the premises. Therefore, all right of distress ceased as to the \$200.

On the 23rd of April the execution in the suit of *Slater v. Anthony* was placed in the hands of the sheriff, and seizure was made thereunder, sometime after the 21st of May, and prior to 23rd of June.

On the 10th of July a further quarter's rent fell due, the goods then being *in custodia legis*, and the rent being due from English and not from Anthony.

On 26th July an interpleader summons was obtained, and an order made thereon on 10th September following, the issue being to test the title of English under the sale in *Maclean v. Anthony*, Slater contending that as against him the proceedings were fraudulent. In this issue Slater was successful.

On 17th September, the sheriff notified the execution creditor of a claim by Garvey of \$174.60 for rent, and a claim of about \$60 for taxes, and on the 21st of September the solicitor for the execution creditor by letter declined to pay the rent, saying nothing as to the taxes, but adding "you will understand that my client does not admit the landlord's claim."

The sheriff thereupon gave up the goods to the bailiff for the landlord, who sold for the rent and taxes, the goods realizing within about \$3 of the claim for rent, taxes, and bailiff's fees.

It is thus clear that the landlord had no claim which the sheriff was justified in acknowledging, and unless therefore some other answer can be found to this motion it must succeed.

Then was the claim for taxes such an one as justified the sheriff in abandoning? It will be observed that the refusal to pay by the execution creditor's solicitor was only as to rent, not taxes. Passing that by for the moment, let us consider whether the bailiff had a claim for taxes superior to the sheriff's claim under his execution.

If the warrant for distress had been for taxes on non-resident land, possibly he would have had a superior claim: See *Adshead v. Grant*, 4 P. R. 121.

The clause at the end of sec. 95, ch. 180, R. S. O., providing that "no claim of property lien or privilege shall be available to prevent the sale, or the payment of the taxes and costs out of the proceeds thereof," only applies to distress for rates on non resident land: clause 93,

providing for collection by distress on lands of residents, has no such provision. This is probably an oversight, as reference to 16 Vic. ch. 182, sec. 42, will show that the provision was intended to apply to all distress for taxes; but in the consolidation of the statutes in 1859 it became by separation of clauses attached to the clause as to non-residents only. This was apparently not observed when 32 Vic. ch. 36 was passed: see sec. 97; and as this Act repealed the former Assessment Act, I must now take it to be the law that such provision does not apply to distress except for taxes or rates on non-resident lands, although probably apart from 32 Vic. the consolidation would not have had that effect. I fear I must therefore hold that the claim for taxes was not superior to that under the execution. Power to levy by distress is given—see sec. 93, ch. 180 R. S. O.—but only of “the goods and chattels of the person who ought to pay the same, or of any goods or chattels in his possession.” These goods were not in the possession of the tenant, and the omission of the proviso found in clause 95 leads to the conclusion that, as against the claim under the execution, the goods could not be said to be those of the tenant, if he be the person who ought to pay the rent; nor do I think the sheriff could be said to be the occupant of the premises within the remaining words of the section. See also sec. 107 of ch. 36 of 32 Vic., where the preferential lien of taxes is again declared, but is confined to land.

Had I come to a different conclusion, the difficulty as to the execution creditor not refusing to pay the taxes would still remain.

Mr. Holman objected that it did not sufficiently appear that the money had not been paid into Court by the sheriff. The advance against technical objections has been too marked and rapid to permit such an objection to prevail. My brother Galt, before whom the motion first came, on its return, when it was enlarged, stated that he would allow any formal evidence on that point to be supplied. I am quite satisfied on the evidence before me. I

wish for the sake of the sheriff there were a doubt on the point.

It was further objected that there was not a reasonable time after the interpleader order had been made a rule of Court within which to comply with its terms before this motion was made. Had there been any intention to comply with its terms, I would consider such objection on the question of costs. It is without substance, and fails.

It was again objected that this form of application was not the proper mode of procedure—that proceedings should be by action, citing *Collins v. Cliff*, 8 L. T. N. S. 466. In that case the Court refused an order for attachment where the sheriff handed over the goods to the assignee in Bankruptcy after the claimant had been barred by the interpleader order. The ground of decision was, that “as the title to the goods was in question, and as attachment only issued where there had been a clear disobedience and contempt of Court, which it was impossible to say the sheriff had been guilty of, there should be no attachment.” The Judges were, of the Court of Exchequer, Pollock, C. B., Martin, Bramwell, and Channell, B.B. I have found a case, however, of *Angell v. Baddeley*, in L. R. 3 Ex. D. 49, in which Bramwell, Brett, and Cotton, L.JJ., delivered judgment, and the opinion there was expressed as follows: Bramwell, L.J.: “If the plaintiff was likely to be prejudiced by the act of the sheriff, he should go to the Court or a Judge and claim the benefit of the interpleader orders, and call upon the sheriff to sell the goods.” Brett, L.J.: “I am not prepared to say that the sheriff acted rightly in withdrawing from possession, or that he had any discretion in the matter. The sheriff had a discretion before he obtained the interpleader order, but after he had applied for an order in respect of each claimant, and had obtained a protection in certain terms, he was bound to obey the order. I am inclined to think that the sheriff might be attached for not obeying the order made at his own instance, but it is not necessary to decide that point.” Cotton, L.J.: “I am not inclined to say that the sheriff has any right to withdraw

from possession and give up the goods ; but it is not necessary to decide that point." It will be observed that Bramwell, L.J., was in the Court when both cases were decided.

In *Clarke v. Farrell*, 31 C. P. 584, the Court were of the opinion that the sale by the sheriff after the interpleader order was not under the writ, but under the order. *Dent v. Basham*, 9 Ex. 469, and *Emerson v. Lashley*, 2 Hy. Bl. 248, shew the opinion of the Court as to actions to enforce orders

In *Dajoe v. Ruttan*, 19 U. C. R. 334, such an action was brought apparently without objection, although, as it failed on other grounds, it perhaps does not assist in reaching a result. *Henderson v. Wilde*, 5 U. C. R. 585, cited by Mr. Aylesworth, is a direct authority in his favor. There Robinson, C. J., says: "That the sheriff is liable to an attachment for selling the goods in direct violation of the interpleader order, there can be no doubt, and upon the return of the attachment it will be in the power of the Court to direct such a course to be taken as will indemnify the claimant for the inconvenience to which he has been subjected." The learned Chief Justice in that case uses the following language: "There can be no doubt that the sheriff was bound by the rule or order of interpleader made upon his own application," language almost identical with that used by Brett, L. J., in *Angell v. Baddeley*, more than a third of a century thereafter.

The order for a writ of attachment must go. I think I must follow the case of *Henderson v. Wilde*, and *Angell v. Baddeley*, in preference to *Collins v. Cliff*. Indeed, I think I would not be consulting the best interests of the sheriff (so far as I am at liberty to consider them, he being an officer of the Court seeking its protection), by sending him before a jury for trial, where, so far as I can see, the result would be adverse, and the damages probably doubled by the costs of the action. Moreover, I think this mode of procedure the most proper, as under it the Court can regulate the conduct of its officers. It seems to me that the sum the sheriff

should be called upon to pay, to relieve himself from the order I am compelled to grant, is the sum realized at the sale by the bailiff, less the usual fees, poundage and incidental expenses, as if the sale had been by his own officer. In case of dispute as to these they can be settled by the Master in Toronto. I am satisfied on the affidavits that the goods realized as much as if they had been sold by the sheriff. I am assuming, of course, that Slater's claim is equal to or greater than the amount thus realized. The sheriff must of course pay the costs of the motion; if he pay these sums within thirty days from the date of the order, the writ not to issue. If the sheriff desire to appeal from this order he may have a stay of issue of the writ by paying into Court or giving security to the satisfaction of the Master in Toronto in a sum sufficient to cover the amount above named, and costs.

Judgment accordingly.

[QUEEN'S BENCH DIVISION.]

IN RE ARBITRATION BETWEEN THE ONTARIO AND QUEBEC
RAILWAY COMPANY AND GEORGE TAYLOR.

Railway Company — Expropriation — Award — Compensation for possible damage by felling trees — Mode of estimating compensation — Damages — Sufficiency of notice.

The right of a railway company to cut down trees for six rods on each side of the railway under the Consolidated Railway Act 1879, sec. 7, subsec. 14, is entirely distinct from their right to expropriate land for the road. If compensation can be claimed for it, it must be distinctly demanded by the notice.

Held, therefore, that an award was bad in allowing compensation to the owner of lands expropriated for the damage that might accrue to the owner by the possible exercise of such right.

Quære, whether under the Consolidated Railway Act, 1879, more than the value of the land actually taken can be allowed, as the Act does not contain a section equivalent to sec. 7 of R. S. O., ch. 165, and sec. 5 of C. S. C. ch. 66, giving compensation for damages to lands injuriously affected.

Semble, that where a parcel of land is severed by the railway the actual value is the difference between the value of the land of which it forms part before the expropriation, and the value to the owner of the remainder after the expropriation.

Held, that the possible damages to bush land from greater exposure to winds and storms, and the greater liability to injury by fire by reason of the working of the railway, were contingencies too remote to be considered in estimating the amount of compensation where there were no buildings to be endangered.

The notice by the railway company included compensation "for such damages as you may sustain by reason or in consequence of the powers above mentioned."

Held, sufficient to allow the arbitrators to award damages resulting to the owner from the expropriation.

On the 30th day of November, 1883, in Court, before Armour, J., Hector Cameron, Q.C., on behalf of the Ontario and Quebec Railway Company, obtained a rule *nisi* calling on George Taylor to shew cause why the award made between the parties, on the 12th day of September, 1883, should not be set aside, or the amount awarded reduced, or the award be referred back to the arbitrators with such directions as to the Court should seem proper, on the grounds that the arbitrators proceeded on an erroneous principle and exceeded their jurisdiction, and awarded on matters not within the submission, in this, that they allowed and awarded a sum for compensation for the

prospective cutting down of trees and timber to the extent of six rods on each side of the railway, and for the contingent and possible injury to the timber and trees standing on the residue of the land, and they estimated the value of the property, and the compensation and damages to be awarded, on the basis of a remote contingent increase in value to arise from the availability of the property as villa or residential property instead of its value at the time of taking.

The arbitration was under section 9 and its subsections of the Dominion Consolidated Railway Act, 1879.

The notice given by the company in accordance with subsection 12 of said section 9 was, as far as material, as follows :

To George Taylor, of the township of York :—

Take notice that the land required by and to be taken by the Ontario and Quebec Railway Company from you for the purposes of their railway, may be described as follows. Then followed a precise description of the land required, containing $2\frac{8}{10}$ acres more or less, composed of part of lot No. 11, in the 3rd concession from the Bay, in the township of York, as set out in the plan to the notice annexed. The notice then proceeded as follows: The powers intended to be exercised by the said the Ontario and Quebec Railway Company, with regard to the land above described, are the acquiring of the said land for the purpose of constructing and thereafter of operating their railway thereon: that the said the Ontario and Quebec Railway Company are ready and willing, and hereby offer to pay the sum of \$1,200 as compensation for the land above described, and as compensation for such damages as you may sustain by reason or in consequence of the exercise of the powers above mentioned, and that in the event of your not accepting this offer Nicol Kingsmill is to be appointed as and will be the arbitrator of the said Ontario and Quebec Railway Company.

The name of J. J. Kingsmill, Judge of the County Court of the County of Bruce, was afterwards by consent of the

parties substituted for that of Nichol Kingsmill, as the company's arbitrator. William Tyrrell was appointed arbitrator for the owner, George Taylor, and James Tilt was appointed third arbitrator.

In support of the rule *nisi*, *H. Cameron*, Q. C., on behalf of the company, read the affidavits of the said J. J. Kingsmill and the said James Tilt, with other affidavits. The affidavit of the arbitrator Kingsmill set forth (2) that in estimating the compensation awarded the arbitrators took into consideration, first, the value of the land taken; second, the damage caused by severance to twelve acres lying north of the land taken from the remaining portion of the farm; third, the damage caused by cutting down the trees on each side of the said land to a distance of six rods from the railway, upon the understanding that the said trees were to be removed by and belong to the said George Taylor; fourth, the damage which would likely be caused to twenty-two acres of bush land belonging to the said Taylor, situated south of the said railway, by reason of the cutting down of the said trees and opening so wide a passage for winds and storms through the said bush land, and also the damage which the arbitrators considered would be caused to the said bush land from its exposure to fire from the running of the company's trains through or along the same: that the damage under the last head they estimated at twenty per cent. of the value of the said bush land. (3) The sum of \$3,620 awarded to the said George Taylor included damages in respect of all the items above mentioned—that is to say, for the first item \$1,120; for the second item \$1,000; for the third item \$500, and for the fourth item \$1,000. This affidavit was sworn on the 17th day of November, 1883.

The affidavit of the arbitrator Tilt set forth (2) that he had read the affidavit of John Juchereau Kingsmill, sworn on the 17th November, and that he concurred in the statements therein: (3) that inasmuch as the said rail-

way company had power, under the General Railway Act, to cut down all trees to a distance of six rods on each side of the railway, the arbitrators considered that it was their duty, as matter of law, to assume that they would do so, and made the award upon that principle.

In answer to these affidavits John Leys, counsel for the owner of the land, Taylor, filed and read the affidavit of the arbitrator Tyrrell, which set forth (2) that Mr. James Tilt, the third arbitrator, and he were prepared to have awarded to the said George Taylor a larger sum than the amount awarded to him ; but at the urgent solicitation of Judge Kingsmill, the arbitrator of the company, and in order to have a unanimous award, they consented reluctantly to reduce the amount they were prepared to award to the amount which was awarded, and thereupon a unanimous award was made. (3) That they did not base their award upon a remote and contingent increase in value to arise from the availability of the property as village or residential property, but did base their award on its value at the time of the taking by the railway company. (4) On the evidence taken, they considered the property at the time of taking was worth a certain sum, and that it was reduced in value by the railway running through it by the amount awarded.

There were conflicting statements in other affidavits filed as to whether an agent of the company had not required Taylor to cut down the large standing timber on the six rods on each side of the railway.

John Frederick Taylor, son of George Taylor, swore, (2) that he had, prior to the arbitration, several interviews with the agents of the company (not naming them) about cutting the timber on the roadway taken by the company through the lands of the said George Taylor : (3) that he was informed by the company's agents that the said George Taylor must cut down all trees standing on said lands to the extent of six rods on each side of the railway track : (4) that acting under such directions from the said agents, the said George Taylor caused to be cut down all

the large pine trees on his lands within six rods of each side of the railway track : (5) that it was distinctly agreed between the company and the said George Taylor at the time of the arbitration that the timber on the roadway within six rods on each side thereof should be cut by the said George Taylor, and such timber when cut should be his property, and the arbitrator, inestimating the damages, proceeded upon that basis.

Affidavits in reply were filed and read.

The chief engineer of the company, Hugh D. Lumsden, swore (3) that he never informed George Taylor or any one else that it would be necessary to cut down all the trees on his said property to the extent of six rods on each side of the track, nor did he know of any one who had done so : that it was only necessary or expedient to cut down such trees as were considered dangerous, and to the best of his recollection and knowledge there were only four or five pine trees on said Taylor's property which required to be cut down outside of the company's right of way: (4) that Samuel B. McKee was the division engineer of the portion of the railway through Taylor's property, and it was his special duty and business to attend to the cutting down of the trees: (5) that the company had no intention whatever of causing any more trees to be cut down at the place in question, and if said Taylor had cut or intended to cut any other, it was for his own purposes and not for the company or by their instructions or authority: (6) that he did not know of any person other than Hugh Ryan, the superintendent of construction, Samuel B. McKee, and himself, who would give or had any authority to give any instructions to the said Taylor respecting the cutting down of the said trees.

Hugh Ryan swore : (1) that he was superintendent for the construction of the railway, including the portion in question : (2) that it never was the intention of the company to cut down all the trees standing on the land of the said George Taylor, which was taken for the said railway of six rods on either side of the track for the reason it was

unnecessary to do so : (3) that he had read the affidavit of John Frederick Taylor, and that he did not inform the said Taylor that the said George Taylor must cut down all the trees standing on his land to the extent of six rods on either side of the track, and he did not know any one who did so inform him on behalf of the said company; in fact such a statement would have been contrary to the practice and intention of the company, and inasmuch as such a statement would have tended to an unnecessary increase of charges to be paid by the company, he could not believe that any such statement was made: that such a statement would have been totally unauthorized, and not within the authority of any of his subordinates; nor did he ever give instructions to have any such thing done.

Samuel B. McKee made affidavit to the same effect. He swore: (1) that he was division engineer and had, under Hugh D. Lumsden, superintendence of the portion of the line which went through the property of George Taylor: (2) that he had read the affidavit of John Frederick Taylor: that he saw the said George Taylor and his son at the time of the arbitration, and had a conversation with them respecting the cutting down of trees on the land of the said George Taylor on each side of the railway track: that he told them it would only be necessary to cut down such trees as would be considered dangerous; that he did not tell them or either of them that it would be necessary to cut down any other trees; in fact it was not usual to do so, and the company had no intention whatever of cutting down any trees except such as might be considered dangerous: that he had been frequently at the place in question since the said arbitration: that there were only four or five trees on said Taylor's property which he considered dangerous which were cut down, and it was by his instructions that they were cut down: that the company had given no instructions for cutting, and had no intention of cutting any others.

The award was headed, In the matter of the Consoli-

dated Railway Act, 1879, and of the arbitration between *The Ontario and Quebec R. W. Co.* and *Mr. George Taylor*, and part of lot number eleven in the third concession of the Township of York, east of Yonge street, and proceeded, "We, John J. Kingsmill, William Tyrrell, and James Tilt, the arbitrators duly appointed in the above matter pursuant to above statute, having taken upon ourselves the burden of the said reference and heard evidence and counsel for both parties, do by these presents award and adjudge that the Ontario and Quebec Railway Company do pay to the said George Taylor the sum of three thousand six hundred and twenty dollars as compensation for the land hereinafter described (the description was the same as that in the company's notice); and as compensation for such damages as the said George Taylor may sustain by reason or in consequence of the exercise of the powers of said railway company with regard to said lands as set forth in the said notice. And we certify that in deciding on such compensation we have taken into consideration the increased value that would be given to the lands or grounds of the said George Taylor through or over which the said railway will pass, by reason of the passage of the said railway through or over the same, or by reason of the construction of the railway, and have set off the increased value which will attach to said lands or grounds against the inconvenience loss or damage that might be suffered or sustained by reason of the said company taking possession of or using the said lands or grounds as hereinbefore described.

The rule *nisi* was supported by *H. Cameron*, Q.C., and *R. M. Wells*, counsel for the company, and

John Leys, counsel for George Taylor, shewed cause.

September 2, 1884. CAMERON, C. J.—I am of opinion the award must be set aside, on the ground that the arbitrators exceeded their jurisdiction in considering any detriment to the land that might arise from the exercise of any power on the part of the railway company to

remove the trees on the land outside of the track to the extent of six rods on each side thereof. The authority to the company to remove trees, or cause their removal, is to be found in sec. 7, sub-sec. 14 of the said Consolidated Railway Act of 1879, (42 Vic. ch. 9, D.) It is as follows: "The company shall have power and authority to fell or remove any trees standing in any woods, lands or forests, where the railway passes, to the distance of six rods from either side thereof." This is a power totally distinct from and in addition to the right of the company to acquire land for their road-bed, stations, &c., and has nothing whatever to do with the compensation to be awarded to the owner of land acquired by the company; and so can properly form no part of the considerations that should weigh with arbitrators in fixing the compensation to be paid by the company for the lands taken, or damages resulting from the exercise of the power to take the lands. The company either has the power to remove the trees standing within the prescribed distance of the railway without compensation, or it is a power to be exercised over the land of another, and compensated for in like manner as for lands taken, in which case the company must claim the right by notice, and offer a compensation in the same way as they would were they seeking to acquire the land on which the trees stand. If the owner of the trees is not satisfied with the compensation offered, the amount of compensation will form the subject of arbitration. But until the company has claimed by notice the right to exercise the power of removing trees, arbitrators appointed under the statute to fix the compensation for land taken have no power to award compensation to the owner of the trees for their past or prospective removal. Assuming that the owner of trees removed, in the exercise of the powers conferred upon a railway company under sec. 7, sub-sec. 14, is entitled to compensation, it would seem clear, from the language of sub-sec. 12a of sec. 9, read with sub-sec. 10 of the same section, that the intended exercise of such power is the subject of notice. Sub-section 10 provides that one month after

the deposit of the map or plan and book of reference required by section 8, and the requisite publication of notice thereof, application may be made to the owners of lands, or the parties empowered to convey lands, or interested in lands which may suffer damage from the taking of materials or the exercise of any of the powers granted for the railway, and thereupon agreements and contracts may be made with such parties touching the said lands, or the compensation to be paid for the same, or for the damages, or as to the mode in which such compensation shall be ascertained, as may seem expedient to both parties; and in case of disagreement between them, or any of them, then all questions which arise between them are to be settled by arbitration in the manner indicated by the sub-sections that follow the said sub-section 10. Sub-sec. 12 (a) declares that the notice given by the company to the party indicated in sub-section 10, that is to say, the owners of the land, or parties empowered to convey, or interested in the lands, shall contain "*a description of the lands to be taken, or of the powers intended to be exercised with regard to any lands, describing them.*"

The only power that the notice served upon the owner of the land in question here indicated an intention on the part of the company to exercise was that of taking absolutely the portion of land described in the notice, and there was no indication whatever of an intention to exercise the power conferred by section 7, sub-section 14, of removing the trees standing upon the six rods of land adjacent to the land required. The consideration of the damage that would flow to Taylor from such removal was wholly outside of the submission, and the including the sum of \$500 in the sum awarded by the arbitrators on account of such damages renders it impossible legally to uphold the award. I take it to be established by the affidavits of Mr. Kingsmill and Mr. Tilt that this sum of \$500 was allowed for such damage. Their statement to that effect is not in terms denied by Mr. Tyrrell; but it is difficult to reconcile Mr. Tyrrell's allegation that the award

was based on the value of the property at the time it was taken, if in fact \$500 of the sum awarded was given in respect of the removal of trees from other property than that taken, and \$1,000 for the possible injury that might arise to twenty acres of bush land by the opening through the woods a passage for the winds, and increased possibility of fire getting into such woodland from the use of locomotives on the railway.

As to the correct method of arriving at the value of lands taken for the purposes of a railway in circumstances like those presented in the present case, there may be some room for doubt. Mr. Wells contended that the value of the land actually taken, without reference to the effect the severance of other parts of the land by reason of the railway may have upon those parts, was all that could properly be considered where the company has its act of incorporation from the Dominion Parliament, or, in other words, is subject to the Dominion Consolidated Railway Act, as the Dominion Act of 1879 omits section 7 of the Railway Act of Ontario, ch. 165 R. S. O., which was also contained in the Consolidated Railway Act of the old Province of Canada, ch. 66, sec. 5 C. S. C., under which the owner of lands injuriously affected was entitled to compensation. The omission, he contended, was a deliberate omission indicative of the intention of the Legislature to confine the compensation to be paid for lands taken for railway purposes to the value of the lands so taken. The omission is a singular one, as it leaves the right of the land owner, whose lands are taken for railway purposes, to be paid for his land to be implied or inferred, instead of being positively declared as it was under the old and is now under the provincial law. The omitted clause was as follows: "For the value of lands taken and for all damages to lands injuriously affected by the construction of the railway in the exercise of the powers by this or the special Act, or any Act incorporated therewith, vested in the company, compensation shall be made to the owners and occupiers of, and to all other persons interested in, any lands so taken or injuriously affected." This pro-

vision was in addition to the provision contained in section 9 and its subsections of the present Dominion Act. Section 9 and sub-sections are identical with sections 11 to 20, inclusive, of the R. S. O. ch. 165. There may therefore be much room for Mr. Wells's contention that section 7 of the Ontario Act has a wider scope than sub-section 10 of section 9 of the Dominion Act. It is not necessary to determine whether it has or has not on this motion.

It appears to me the value of the land taken is to be determined by ascertaining the value of the land of which it forms a part before the severance, and the value of such land after the severance, and the difference will be the actual value to the owner of the piece taken. This method will give to the owner a just compensation for the enforced expropriation of his land; and if the whole land is enhanced in value, a question that must enter into the estimate of the amount to be awarded to the owner, the railway company will get the benefit of the value given to the land by the railway in setting off such enhanced value against any damage resulting to the owner from the taking of the piece expropriated through inconvenience or depreciated value from severance.

The possible damage to the remaining lands from greater exposure to winds and storms, and the greater liability to injury by fire by reason of the working of the railway, are too remote contingencies to be taken into consideration in estimating the value of the land taken where there are no buildings to be endangered.

In *Cummings v. The Credit Valley R. W. Co.*, 21 Grant 162, Proudfoot, J., held that under a reference to the Master, to ascertain the amount payable for compensation or damages for lands taken, or to be taken, damages for lands injuriously affected could not be given. He said, p. 164-65: "But an arbitrator under the Act, on a reference to ascertain the value of lands taken or to be taken, would have no power to enquire as to those injuriously affected. The matters are essentially distinct. One may exist without the other, and the value of lands taken cannot by any

reasonable implication include damages to lands that are not taken."

But in the *Great Western R. W. Co. v. Warner*, 19 Gr. 506, it was held that the allowance of a sum for depreciation to a farm generally by the permanent occupation of part of the land by a railway, was not improper. This decision was based on the decision of the House of Lords in *The Duke of Buccleuch v. The Metropolitan Board of Works*, L. R. 5 E. & I. App. 418. The Act under which that decision was given differs from the Act which governs in this case, and the circumstances were different. It cannot therefore be deemed to furnish authority for holding that the possibility of injury without actual injury may be considered in estimating the value of lands taken. In *Masson v. Robertson et al.*, 44 U. C. R. 323, it was held that an allowance of \$100 for risk from fire to barns was not objectionable on the principle of the decision in the case of the *Duke of Buccleuch v. Metropolitan Board of Works*. The award in that case was under section 7, ch. 165, R. S. O., and it appears to me there is a wide distinction between the danger of fire to buildings, whereby the insurance risk is made more hazardous, and an immediate increase in the rate of premiums takes place. In such case, in a sense, the land remaining is at once injuriously affected or diminished in value by the additional burden imposed upon the owner to obtain the same protection that he before enjoyed in the shape of insurance. This deterioration in value is capable of being definitely estimated. But in case of danger from storms or fire to bush land it is not possible to estimate or assign any measure to the danger, as loss or injury may never happen, and it would not seem to have been the intention of the Legislature to compensate the land owner for anything but actual damage. If therefore the words, "injuriously affected," were in the Dominion Act, the possible events of storms and fire would be too remote to form an ingredient in the estimate of the value of lands taken or of damage thereto or to the owner by reason of the construction of the rail-

way ; and without these words, it seems to me, there is no room whatever for the contention that they can be considered as coming within the words "which may suffer damage from the taking of materials or the exercise of any of the powers granted for the railway," used in section 9, sub-sec. 10, of the Dominion Act. It follows, if this view is correct, that the third and fourth items included in the amount awarded, were not properly included, and if Mr. Wells's contention is well founded, that it is the mere actual value of the piece of land taken without any reference to the effect its severance from the residue of the lot of which it forms a part, then the second item is also wrong.

But, without expressing any opinion as to the sufficiency or insufficiency of the sum allowed under that head, for the reason already assigned, I think the value of what is taken may, and often must, necessarily, depend upon the effect its being taken will have on the value of the rest of the property. Thus, where a house costing \$1,000 has been built on a lot 100 feet deep that cost \$200, the market value of the whole being \$1,200, and a railway takes 60 feet from the depth of the lot, and the market value of the remaining portion of the lot with the house on it is thereby reduced to \$800, the value of the 60 feet is not to be taken as three-fifths of the amount paid for the land, or \$120, but \$400, the value of it in the situation in which it is to the owner. If, therefore, the arbitrators were justified in finding that by reason of the taking of $2\frac{8}{10}\%$ acres the land remaining to the owner was made \$1,000 less in value without any reference to the use or purpose for which the land taken was to be applied, then it seems to me the actual value of the piece so taken was not \$1,120, but \$2,120, and the damage to the owner by the exercise of the company's power to take his land was not the former but the latter amount. If the building the railway increases the value of the remaining land to an amount equal to the depreciation, or greater than the depreciation caused by the severance, then the actual value is all the owner would be entitled to. It is the

value of the land taken at the time it is taken for any purpose to which it may at that time be reasonably applied and command a market that must determine the compensation to be paid by the railway company therefor; and speculations as to its becoming valuable in the future for villa lots, or any other special purpose for which it at the time of taking has no actual value, ought not to be allowed to influence arbitrators in estimating and awarding such compensation.

The arbitrators do not appear in any way to have intentionally erred. I shall therefore direct the award to be remitted back to them for further consideration, without costs of this application to either party, and enlarge the time for the arbitrators to make their award until the 1st day of January next.

I will only add that in my opinion the notice given by the company constitutes a submission sufficiently wide to allow the arbitrators to award, in addition to the value of the land taken, the damages resulting to the owner from such taking, if the value cannot properly be estimated by the difference between the value of the whole land before the taking, and the value of the land remaining to the owner after the taking, as such damage is the direct and consequent result of the exercise of the power by the company to take the land, and is covered by the words in the notice offering the sum of \$1,200 as compensation for the land, "and for such damages as you may sustain by reason or in consequence of the powers above mentioned."

Judgment accordingly.

[QUEEN'S BENCH DIVISION]

IN RE ARBITRATION BETWEEN THE CORPORATION OF THE
TOWNSHIP OF MUSKOKA AND THE CORPORATION OF
THE VILLAGE OF GRAVENHURST.

Municipal Act—Arbitrators—Award—Time for making award—Interest of arbitrator—Filing evidence—Award ordered to be made by Chancery Division—Setting aside in Queen's Bench Division—R. S. O. ch. 174.

Quere, whether an award made by arbitrators pursuant to the Municipal Act R. S. O. ch. 174, is invalid though made more than a month after the appointment of the third arbitrator, notwithstanding section 377 of the Act.

By section 378 no member, officer, or person in the employment of a corporation interested in any arbitration, nor any person so interested, shall act as an arbitrator under the Act.

Semble, that a ratepayer was disqualified, and that the objection would not be waived by mere acquiescence.

By section 383 the arbitrators are to file with the Clerk of the Council the notes of the evidence taken. There being two councils interested in the arbitration, the arbitrators did not know with which clerk to file the evidence, and did not file it.

Held, that the award was not thereby invalidated.

The award having been directed to be made within a year by an order of the Chancery Division, where the parties were litigating concerning it,

Held, that the motion to set it aside or refer back on the above grounds, or on the merits, should have been made in that Division, and should be transferred.

ON the 16th February, 1883, *Shepley*, for the corporation of the township of Muskoka, obtained a rule *nisi* calling on the corporation of the village of Gravenhurst to shew cause why the award made between the said corporations on the 9th January, 1883, should not be set aside, and the matters referred remitted to the consideration and determination of an arbitrator to be appointed by the Court, or why the Court should not increase or diminish the amount awarded, or otherwise modify the award as justice should require, on the grounds:—

1. That the arbitrators did not make their award within one month after the appointment of the third arbitrator.

2. That James Harvey Hill, one of the arbitrators, was a person interested in the said arbitration and award, and was by law disqualified from acting as an arbitrator.

3. That the said arbitrators had not filed with the clerk of the council of the township of Muskoka full notes of the oral evidence given on the reference, and also all documentary evidence, or a copy thereof, or any statement of the grounds of the award.

4. That the said arbitrators wrongfully and improperly received evidence upon and considered several items of claims upon the said arbitration which were not within their powers of arbitration in respect of the disposition of the property of the union, and, amongst others, claims for and in respect of moneys collected or to be collected for school purposes, and paid to the public school trustees for the several sections of the township of Muskoka.

5. That the said arbitrators allowed claims in respect of the property of the union which ought to have been disallowed, and disallowed claims which ought to have been allowed; and that the allowances made by the said arbitrators in respect of the claims before them and embodied in the said award were unjust.

From the award, evidence, and papers filed on the application, and on the argument of the rule on June 22, 1883, when *Laidlaw* appeared in support of the rule, and *Lount*, contra, it appeared that the appointment of the third arbitrator was made on or before the 17th day of November, 1882, on which day they took the oath required by section 379 of chap. 174 R. S. O., well and truly to try the matters referred to them, and a true and impartial award to make according to the evidence, and their skill and knowledge: that they made their award on the 9th day of January following, being more than one month after the appointment of the third arbitrator: that the only agreement of submission to arbitration between the corporations was contained in the notice of appointment given by each municipality to the other, that given by the corporation of the township of Muskoka being entitled: 'In the matter of the separation of the Municipal Corporation of the Village of Gravenhurst from the Municipal Corporation of the Township of Muskoka, and of the

adjustment and final settlement of accounts, assets, property and liabilities consequent thereon, and of the determination and award of what sum of money, if any, should justly be paid by the one of such corporations to the other of them upon such separation, on revision of all matters that ought to be considered and passed in arbitration after such separation." Then followed notice of the appointment of James Boyer as an arbitrator to act in the above matter. The notice of appointment of an arbitrator on behalf of the Corporation of Gravenhurst was as follows :

"In Chancery.

"In the matter of the Municipality of Gravenhurst v. The Municipality of Muskoka.

"Pursuant to R. S. O. ch. 174, sec. 367 *et seq.*, and under the order made by the Court in the above-named matter, I have this day appointed J. H. Hill, Esq., of the village of Gravenhurst, to be the arbitrator in the said above matter on the part of the corporation of Gravenhurst."

This was addressed to Jonathan Tasker, the reeve of the municipality of Muskoka, and was signed by G. W. Taylor, Reeve, and had impressed thereon the seal of the corporation of Gravenhurst.

The evidence taken by the arbitrators was not filed with the clerk of either of the municipal councils, as, there being two councils concerned, the arbitrators did not know with which clerk to file it; but a copy of the evidence was filed on the application.

The award recited that in a certain action or proceeding in the Chancery Division of the High Court of Justice of Ontario, wherein the municipality of the village of Gravenhurst was plaintiff and the municipality of Muskoka was defendant, such proceedings were had in said action that, on the 3rd day of April, 1882, judgment was rendered refusing to restrain the arbitration, and directing it to be concluded within one year, and reserving costs till award made. The arbitrators found by their award that, at the time of the separation, the township of Muskoka had assets to the amount of \$2,417.64, and was indebted and

had liabilities amounting to \$1,708.65—leaving a balance of assets over liabilities of \$708.99; and that the village of Gravenhurst was entitled to the sum of \$408.38, being fifty-seven and six-tenths per cent. of the said sum of \$708.99, and the township of Muskoka to \$300.61, being forty-two and four-tenths per cent. of the said sum of \$708.99. They awarded that the township should pay to the village \$408.38, with interest thereon at six per cent. from the time of the separation, to be paid within six months after the date of the award.

September 2nd, 1884. CAMERON, C. J.—On this rule are presented three questions of a technical character, and one upon the merits. The first is, is the award void, not having been made within one month after the appointment of the third arbitrator, as required by section 377 of Chap. 174 R. S. O.? This section provides: "In any of the cases herein provided for the arbitrators shall make their award within one month after the appointment of the third arbitrator." Assuming that this reference must be treated as a submission solely under chap. 174 R. S. O., I am by no means prepared to say that the above limitation of a month must have the effect of making an otherwise valid award bad. There is no doubt the language used in section 377 is imperative—that is, imperative on the arbitrators—but it does not follow that the act of those who fail to perform a duty in a specified time made imperative upon them must be held nugatory when performed by them afterwards. In an ordinary submission there is usually a provision or condition that the parties will abide by the award, so that, or provided that it is made within a specified time, and there is thus a direct limitation of the authority of the arbitrators to bind the parties. In this case the submission is silent as to time, and would, apart from the Statute, continue the arbitrator's authority for life. Without further consideration, I am not prepared to say the statutory imperative direction to the arbitrators to insure promptness is equivalent to a proviso or condition in the agreement of

the parties limiting the time. But in the present case it appears to me the submission must be regarded as not wholly under the Act, but under the Act and the order and decree of the Court of Chancery together. That Division of the High Court, then, being already possessed of the case, this application should have been made in that Division, and not in the Queen's Bench Division. I think the rule should be transferred to and be treated as a notice of motion in that Division, if it can properly be done at this stage of the proceeding.

By the order of the Court of Chancery the arbitration was to be concluded within a year, which in fact it was, and I do not think this division of the High Court should be asked to say whether the reference must be regarded as simply under the statute, or as under the Court of Chancery's decree and the statute to the extent left unmodified by the decree. That is a question much more within the proper cognizance of that Court, under the circumstances, than of this.

Upon the second question, the disqualification of the arbitrator chosen by the village of Gravenhurst, on account of his being interested in the arbitration, I fear is a fatal objection to the validity of the award, as section 378 of the Municipal Institutions Act expressly declares no person so interested shall be appointed or act as an arbitrator in any case of arbitration under the Act. The interest of a corporator was sufficient to disqualify him as a juror, and was ground of challenge for cause till our Jury Act removed the disability, and it has been held the disqualification extended to a juror who was of kin to the corporator. In *Hesketh v. Braddock*, 3 Burr. 1856, it said there is no principle in the law more settled than this—that any degree, even the smallest degree of interest in the question depending, is a decisive objection to a witness, and much more to a juror, or to the officer by whom the jury is returned. The objection in the case was that the sheriff and jurors were freemen of the city, and it was sustained, Lord Mansfield saying, "The law has so watchful

an eye to the pure and unbiassed administration of justice, that it will never trust the passions of mankind in the decision of any matter of right. If therefore the sheriff, a juror, or a witness be in any sort interested in the matter to be tried, the law considers him as under an influence which may warp his integrity or pervert his judgment, and therefore will not trust him. The minuteness of the interest will not relax the objection, for the degrees of influence cannot be measured. No line can be drawn but that of a total exclusion of all degrees whatsoever."

Our Legislature has removed the common law objection to jurors, who are ratepayers of a municipality, where the municipality is concerned, and to witnesses altogether, on the ground of interest. It has affirmed it with regard to arbitrators in this particular case.

I have not failed to consider the question of waiver, by not raising any objections at an earlier stage, and before the arbitrators had entered upon their duties. But the reeve or council of a corporation can only bind the corporation when acting within the scope of their powers and duty; and the reeve in this case could not by mere acquiescence deprive the great body of corporators of the protection the statute had given them; in other words, he had no power to set aside the statute and waive its prohibition of the appointment of an interested person as an arbitrator, even if he had intended to do so, of which there is no evidence apart from acquiescence.

The third objection cannot prevail, as there were two councils and two clerks. Which was the clerk of the council the arbitrators could not tell, and they could not file the original evidence with both. But under any circumstances their omission to file the evidence would not affect the validity of the award, though it might furnish a ground for the Court's interference. But whether the Court should interfere or not, must depend upon the circumstances of each case.

I have not considered the merits. The material before

me is not sufficient to enable me to do so, if inclined, which I am not, for the reason that I think the application should have been in the Chancery Division, and also because of the arbitrators not being all properly qualified. There was in fact no arbitration, and I have no more right to decide the case than I would have had if the arbitrators had failed or refused to make an award. It is unfortunate that so much expense has been uselessly incurred, and I think it would be well for the parties to consent to a reference to the County Judge, so that the matter may be finally and speedily settled. If they do not feel so disposed, the case must be transferred to the Chancery Division, unless the parties prefer to accept my view, that the award ought to be set aside, and consent thereto.

Judgment accordingly.

[QUEEN'S BENCH DIVISION.]

MARA V. COX AND ANOTHER.

Broker—Pledge of stock—Sale by pledgee—Custom of brokers—Settlement—Pressure—New trial.

The plaintiff, a broker, pledged certain stock with the defendants, brokers, for advances, and it was agreed that the plaintiff might call for his stock or the defendants for their money on two days' notice. The defendants being in need of that stock immediately used it for the purpose of filling their own engagements. Subsequently the defendants alleged that the plaintiff was in default, and the plaintiff, not being aware that they had disposed of his stock, gave them his promissory notes for the amount claimed by the defendants. He subsequently discovered that they had sold the stock.

The defendants set up in defence to this action for the wrongful sale an alleged custom of brokers that upon stock being pledged to a broker he might use it as his own, being ready to return to the pledgee when called upon an equal number of shares of the same stock.

Held, that no such custom was proved, nor would such a custom be valid; that the parties might have agreed to be bound by such a manner of dealing, but in this case no such agreement was proved.

Held, also, that the defendants might lawfully have re-pledged the stock to enable them to raise the advances to the plaintiff, but that the sales and other dispositions of the stock by the defendants without notice to the plaintiff, and when he was not in default, were wrongful, and that the plaintiff was entitled to recover from the defendants the prices at which they sold the stock.

The jury found that the settlement which resulted in the plaintiff giving notes to the defendants was made by him with full knowledge of his rights, but under pressure, and on this and other findings a verdict was returned for the defendants. The Court, being of opinion that the plaintiff was entitled to a verdict but for this finding, and that the finding was against law and evidence, directed a new trial.

THE statement of claim set out that the plaintiff was a broker, and the defendants were a firm of brokers and money lenders: that the plaintiff was in the habit of purchasing shares of the capital stock of banks, and not being provided with funds of his own to pay the full amount of the purchase money for the same, he from time to time pledged the said shares with the defendants, and obtained advances from time to time on the same of sums not less than the market value of the stock: that as the plaintiff made frequent pledges in this way, it was agreed the advances from time to time should be regulated by the average value of the pledges then in

hand, and that the same should not be treated as separate and specific pledges, but a margin for the protection and security of the defendants should be calculated on the average value of the same: that it was agreed that the plaintiff should in any event be entitled to two days' notice of the defendants' intention to sell or deal with the said stock, or any of it, before it should be lawful for the defendants to deal with the same: that such notice the defendants were not to be entitled to give while the plaintiff had a margin calculated on the par value of the stock, on the average stock sufficient to keep the sum up to the market value from time to time, the plaintiff being bound to make good in case of default in taking up the stock after notice as aforesaid any loss sustained by reason of the fall in the market between the price the defendants might sell the said pledge at, and the point at which the defendants' margin had been exhausted: that the defendants well knew the plaintiff's object in purchasing Federal stock was to keep the same out of the market, and to endeavour to raise the price thereof, and that in pledging the same it was most damaging to his interests that the stock should be in any way dealt with, or that the defendants should pursue any other course as to the same than holding, as pledgees, the said stock as security for the money so advanced upon the shares: that the plaintiff under the said agreement, and on the understanding aforesaid, at different dates pledged shares of the capital stock of the Federal Bank of Canada to the number of 1050 with the defendants, and paid in from time to time large sums of money, amounting to the sum of over \$11,000: that on or about the 17th of October, 1883, the defendants, pretending at such date to still hold the said shares by way of pledge, rendered an account to the plaintiff of pretended sales of the same, and claiming a balance due from the plaintiff, as per agreement, of the sum of \$4,162.28: that the plaintiff, relying upon the facts of the representations then made by the defendants, gave his promissory notes for the said amount for the sums

of \$2,000, \$1,162.28 and \$1,000, respectively due on the 3rd days of February, March, and November, 1884: that the plaintiff subsequently discovered that the defendants had, without any default existing, contrary to the agreement entered into, and in violation of the plaintiff's rights, wrongfully and illegally sold and disposed of the said shares at much larger prices than represented by them, and that the defendants had improperly retained the moneys in their hands of the plaintiff, they being in fact in possession of moneys by the said sale, over and above the moneys loaned and the amounts paid in by the plaintiff, and had fraudulently obtained the said notes from the plaintiff: that the defendants, by so wrongfully and illegally selling the said shares, depreciated the market value of the same, and deprived the plaintiff of a large profit thereby, for which the plaintiff claimed damages to the amount of \$20,000. The plaintiff also claimed to recover from the defendants large sums of money, wrongfully charged by the defendants for interest on the said pledges, when the fact was that the defendants had already wrongfully sold the same and illegally appropriated the money to their own use, and the plaintiff was not indebted to them in any sum whatever; and the plaintiff claimed the benefit of all sales of the said 1050 shares pledged as aforesaid on the following dates: 100 shares on or about the 25th of October, 1882, and 950 shares between the 11th of June and the 14th of September, 1883.

The plaintiff also claimed a return of the moneys paid by him to the defendants as for margins, interest, &c., and an order, in the nature of a writ of injunction, directing the delivery up of the said notes to the plaintiff, or the cancellation thereof, or, in case the said notes had been transferred or negotiated by the defendants, then judgment for the amount thereof and interest against the defendants.

The plaintiff, further, prayed discovery of the full dealings of the defendants with the said shares, and an account thereof, the knowledge of which was wholly contained in

the defendants' books; and damages for \$20,000 for such tortious sale, by reason whereof the plaintiff lost large profits on the said shares.

The statement of defence was:

1. The defendants admit the statements contained in the first and second paragraphs of the statement of claim.

2. The defendants deny the remaining allegations in the statement of claim.

3. The defendants say it was well understood between the plaintiff and defendants at the time the stocks mentioned in the statement of claim were pledged, that the defendants should have the right to sell or loan the said stocks from time to time as they might see fit, but the defendants should deliver at any time, upon request of the plaintiff, such stocks, or an equal number of the same.

4. The defendants say that at the time the settlement in the seventh and eighth paragraphs of the statement of claim mentioned was effected, and the said promissory notes delivered, the plaintiff well knew that the defendants had for a long time prior thereto gone short of the market, and had used the stocks so pledged for the purpose of covering the short sales which the defendants had made from time to time. And the defendants submit that the plaintiff having paid the money and given his said notes with the full knowledge of the said facts, and having acquiesced in the defendants so dealing with the stock, is estopped from claiming the relief asked for in the said statement of claim.

Issue.

Amended statement of defence.

1. The defendants deny the allegations in the statement of claim.

2. The plaintiff is a stock broker, and has been doing business in Toronto for a number of years, similar to the business carried on by the defendants, and the plaintiff was fully aware of the mode in which the business of stock brokers in the said city was carried on, and of the custom and practice regulating the same: that for a long

time prior to and at the times of the transactions between the plaintiff and the defendants in question in this action, a reasonable and a well understood custom and practice prevailed among the stock brokers of the city (including the plaintiff and the defendants), respecting transactions in bank stocks, of the nature of those in question in this action, with reference to which custom all contracts and dealings between brokers for the pledge, sale or purchase of bank stock were made and carried out, and with reference to which all contracts and dealings between the plaintiff and defendants, including those in question herein, were made and carried out; and by such custom and practice the broker with whom shares in bank stock were pledged as security for advances made by him thereon was, in the absence of any special contract or agreement to the contrary, entitled to treat said shares in the nature of bank bills or money, and to deal therewith as to him might seem best, he being bound at any time to return to the pledgor thereof, on demand and on repayment of the advances and interest, if any, an equal number of shares of stock, &c. of the same bank, and the said broker having the right at any time to demand from the pledgor repayment of the said advances, and to return to him, on such repayment being made, an equal number of shares as aforesaid, and in default of such repayment to discharge himself from the obligation to return such equal number of shares by crediting the pledgor with the then market price thereof, and accounting to the pledgor for the balance (if any) in his favour, or requiring the pledgor to pay the balance (if any) against him.

3. The defendants say the pledges of stock made with them by the plaintiff were made with reference to and were controlled by the said custom and practice, and there was no special contract or agreement between them to the contrary.

4. At the time the plaintiff pledged the said stock with the defendants and received advances thereon, the defendants were, as the plaintiff well knew, "short of the market" in said stocks, taking into consideration the whole

of the defendants' dealings therein: that to be "short of the market" in a stock is to be under obligation to deliver in return a number of shares thereof in excess of the actual number of such shares held at the time by the broker making such contracts. The defendants, as the plaintiff well knew, required to make use of any shares of said stock pledged by him with them, and being so "short of the market," they were enabled to make advances to the plaintiff, as he well knew, upon said stocks at a less rate of interest than the plaintiff could have obtained from any broker (including the defendants) who was not so "short of the market;" and the defendants say that the advances made to the plaintiff were made at such less rate of interest, and the stocks pledged by the plaintiff with them were so pledged with the knowledge that the defendants had the right to dispose thereof by way of sale or pledge for the purpose of realizing or raising upon them means to recoup the defendants for the time being the advances made by them to the plaintiff.

5. That if the defendants sold or otherwise disposed of the stock so pledged to them prior to the default made by the plaintiff in repayment of the advances thereon they acted in accordance with said custom, and with the agreement and understanding in that behalf between them and the plaintiff; but the defendants at all times had on hand, and were ready and willing, and able, in accordance with their obligation in that behalf, to return to the plaintiff an equal number of shares of such stock on demand, and on repayment of the said advance and interest, or to account to the plaintiff therefor at the then market price thereof.

6. That, in accordance with said custom, and agreement and understanding with the plaintiff in that behalf, the defendants notified the plaintiff that they required him to repay them their advances upon the stocks so pledged with them, and to take back such stocks, but the plaintiff made default, and the defendants thereupon became entitled to discharge themselves from the obligation to

return said stock : that upon an account being taken of the market value of said stock at the time of such default, and of the moneys payable by the plaintiff to the defendant, it was found the plaintiff was indebted to the defendant in a balance exceeding the \$4,162.28 mentioned in the statement of claim, but at the plaintiff's express instance and request the defendants consented to allow for said stock a value exceeding the market value thereof, thereby reducing the plaintiff's indebtedness to the said sum of \$4,162.28, which sum was then due and payable by the plaintiff to the defendants; but on the plaintiff's express request, and for the purpose of enabling him, as a member of the Toronto Exchange, to be in a position to announce to the board thereof that he was not in default in respect of his dealings with the defendants, the defendants consented to take from him the promissory notes mentioned in the statement of claim in full of his liability to them, and they assumed the said stock themselves, and relieved the plaintiff from further liability in respect of the said dealings between them. And the defendants plead the said settlement in bar of the plaintiff's claim.

The cause was tried at the Spring Assizes, 1884, held at Toronto before Hagarty, C. J., with a jury.

The evidence was long. The charge of the learned Chief Justice was very full, and the following questions were put to the jury, which they answered as follows :

1. Q. What was the understanding or agreement on which Mara assigned his stock to Cox ? Was it that Cox was to deal with it as he pleased so as he could return stock to that amount to Mara any time, on two days' notice, or was he to hold it always on hand, or was he only to pledge it for the advance, and not to sell it or put it in the market ? A. We find no evidence of an agreement or understanding as to how the stock was to be held or disposed of other than the two days' call.

2. Q. Had Cox always stock to that amount ready to hand back to Mara on two days' notice, and could Mara at any time on such notice have got back his stock, or stock

to the same amount? A. No. We have no evidence beyond Mr. Cox's statement that they could—Cox & Worts.

3. Did Mara settle with Cox in October with the full knowledge of his position and his rights? A. Yes.

4. Was any advantage taken by Cox over Mara in the settlement, or was there any fraud or false representation by Cox on which Mara was induced to settle? A. We find no evidence of fraud or false representation by the defendants, but there is evidence of pressure to obtain a settlement.

5. Q. Has Mara been injured, or has he sustained any loss or damage by any wrong act done by Cox contrary to any agreement or understanding between them? A. There is no evidence of any breach of agreement or understanding between plaintiff and defendants.

The learned Chief Justice wanted to get an explanation from the jury of their answer to the second question.

The foreman answered. We understood that question to have a sort of double import; we answered to that, they had not stock at the time. As to the defendant's ability to hand the stock over had Mara called for it, we had only the defendants' statement about it.

His Lordship—The question was, do you believe it? And after a good deal of discussion between the learned Chief Justice and the jury as to whether the jury believed the defendants' evidence on that point, the foreman said: "The defendants say they could have delivered the stock, but we have nothing but their evidence about that."

His Lordship—The question is, do you believe it?

Foreman of the jury—We did not reach that point. We only reached the first portion of your question, that they had not the stock on hand at the time.

The learned Chief Justice entered the findings in the terms of the 1st, 3rd, 4th, and 5th answers of the jury, and upon the 2nd question and answer as follows, that defendant had not the stock ready to hand back to plaintiff; and upon these findings he directed the verdict to be entered for the defendants, with costs of suit and award of execution thereon.

The plaintiff's counsel contended that the defendants had no right to sell the stock, although they might have pledged it, and if they sold it they must account to the plaintiff

for the full price they obtained for it. The Chief Justice declined to tell the jury, as a matter of law, that if the defendants did sell the stock they were liable to account for it, upon the evidence, at the highest price they got for it.

The plaintiff's counsel also contended there was no difference in accountability when the transaction was between broker and broker as in this case, and between a broker and one who was not a broker, and that the Chief Justice should have told the jury so; and he should also have told the jury that if the defendants pledged the stock for any other purpose than for the purpose of carrying the loan, the plaintiff was entitled to an account of the profits on the disposition of the stock; and that the stock must always have existed as a pledge, so that it could be got back by the plaintiff, the identical stock; and that the jury should have been told that the plaintiff was entitled to recover from the defendants any profits they had made upon this stock; and he referred to *Carnegie v. The Federal Bank of Canada*, [in the Chancery Division, not then reported. (a)]

At the Sittings in Easter Term, *Osler, Q. C.*, obtained an order *nisi* calling on the defendants to shew cause why the verdict entered herein should not be set aside and a verdict entered for the plaintiff, or a new trial had between the parties, upon the following grounds: That the first finding was against evidence and the weight of evidence. The evidence of the plaintiff and the defendants both shewed there was a pledge of the stock in question and there was no evidence to the contrary, and the defendants merely contended for the custom, under such an agreement, that they were entitled to deal with the stock in the manner stated in their statement of defence. There was no evidence to warrant the finding of the jury upon the third question, and such finding was against evidence and the weight of evidence. The plaintiff stated he was not aware of his position and his rights until after the examination of one Priestman in a suit between the plaintiff and Priestman, and he was then advised upon the facts shown on that examination by

counsel. The farthest the evidence for the defendants went was, that the plaintiff knew the defendants were "short of the market," but such evidence in no way warranted the conclusion that they were short of the plaintiff's own stock, or short in any other than the legitimate one of being short by borrowing stock. Nor was there any evidence to show, nor was it contended, that the plaintiff was aware of his legal rights even if the defendants were short of his own stock to his own knowledge. The answer to the fourth question should have been, upon the evidence, that there was fraud, in the sense of concealment, upon the part of the defendants, as it was not contended that they did not conceal, and the evidence shewed statements by them to the contrary of the position now taken by them, justified by the defendants on the ground that they did not propose telling other persons their business; and on the further ground that the learned Judge, at the trial, improperly rejected evidence in rebuttal, that neither the defendants, Kerr or Moat, had at any time stock standing in their name sufficient to replace the stock of the plaintiff, and that the transfer by the defendants to the said parties was not by way of a pledge but by way of sale of the said stock; and improperly rejected the evidence of the plaintiff, in rebuttal, contradicting certain statements made by the defendant Cox while under examination, as shewn by the certified notes of the trial. And the learned Judge should have directed the jury that if the loan was arranged in the manner specified by the plaintiff and the defendant Cox, that, as a matter of law, there was no difference between a broker dealing with another broker as a banker, and a client, in the sense used by the Judge, dealing with him, and that the person dealing was equally a client; and he should have directed the jury that in a case of such repledge there was no authority to deal with the said stock other than by way of repledge, and that not to a greater amount than the liability for which the said stock was pledged, and that the dealing by the defendants was unlawful, and the learned Judge should have rejected such

testimony and should have informed the jury that the same should not be considered by them. The learned Judge should have further directed the jury that the plaintiff was entitled to an account of the sales made by the defendants of his stock, and that such sales must be said to have been made upon his account, and that the account must be taken upon the basis of the money due from the plaintiff to the defendants, crediting him with the account of sales made at the time the same were made by the defendants, and the difference due to the plaintiff should be the amount of his verdict, with interest. The learned Judge should further have told the jury that the stock for repurchase must always remain in a pledged state in the name of some person or corporation, who could deliver the stock to the plaintiff or defendants upon application made to them for a number of shares; and although the shares not being marked at the time of the pledge it would not be necessary to keep the stock separate and distinct, yet there must always be in the name of the defendants or some person to whom the stock was repurchased, sufficient standing in the pledgee's name to replace it, and the plaintiff could demand the delivery of it in payment of the amount due upon the stock by him, with interest, and that any other mode of dealing allowed the plaintiff only the personal responsibility of the broker. That the learned Judge should further have directed the jury that a readiness to deliver must not mean an ability to go into the market and buy, because that only left the personal responsibility of the broker; but that a readiness to deliver must mean a readiness to deliver either the same stock, or stock standing in the name of the pledgee, for the specified amount, which was accessible to the plaintiff as to the defendants. The learned Judge should have directed the jury that a "carrying of stock," under which the defendants would be entitled by the custom of brokers to repurchase or sell, must mean a "carrying of stock" for the purpose of completing a contract of sale; that is to say, a person purchasing from a broker, but not accepting delivery or making payment, asks the broker to carry for a certain time a

number of shares for delivery in the future—a broker in such case is entitled to deal with the stock in the manner contended for by the defendants, and the evidence of brokers given was directed towards this definition of carrying, and the jury should have been so told. The learned Judge should have told the jury that on the settlement both parties must be aware of the facts, and that concealment of material facts by one party was equivalent to fraud upon their part, and would avoid a settlement made without such knowledge.

J. K. Kerr, Q. C., also obtained an order *nisi* calling upon the plaintiff to show cause, in case the Court should make absolute the order *nisi* on his application, why the second finding of the jury should not be struck out as immaterial for the trial of the matters in question, or why such finding should not be rejected on the said ground; or why such finding should not be amended so as to accord with the evidence and the weight of evidence; or, in case the said finding and any other answer of the jury to any other of the questions might be determined by the Court to be adverse to the defendants, to shew cause why the verdict should not be set aside and a new trial had, on the ground that the said findings and verdict (in such case) were contrary to law and evidence, or against the weight of evidence, without prejudice to and without interfering with the other findings of the jury and the judgment of the presiding Judge.

The plaintiff's counsel moved also upon the affidavit of Norman Dewar, which stated: 1. "I am the person having the charge of the transfer books of the Federal Bank of Canada, and am well acquainted with the entries therein, and the system pursued by the Federal Bank in relation thereto. 2. I was directed to produce the transfer books of the said bank at the trial hereof, but before I could arrive at the Court where the trial was taking place with the books—it being at an hour in the morning when the said books are locked up in the vault of the bank, and only accessible after the doors of the said

vault are open by the parties in charge—the evidence was closed, and, as I am informed and believe, the learned Judge who presided at the trial had ruled that the evidence was not admissible, and the plaintiff did not therefore call me at the said trial. 3. The transfer books of the said bank show the number of shares of any parties holding shares in the said bank. I have examined the entries in the said books, both at Toronto and Montreal, being the only two branches where the transfer ledgers are kept, in reference to the entries of stock held by the defendants herein, one A. T. Kerr, broker, and one Robert Moat, broker, of Toronto and Montreal respectively, between the dates of the 1st of June and the 1st of November, 1883; and I say that the said defendants did not, nor did either of them, hold at any time shares of the Federal Bank stock for more than one day, as the same would be transferred to some other party by the defendants on the day transfer is made to them: that the said A. T. Kerr did not between these dates ever hold any stock in his name for any one day, his account shewing transfer to his name of a number of shares, and a retransferring of the same shares or a portion thereof on the same day. 4. I have also examined the transfer books with reference to the account of Robert Moat, of Montreal, and find between the dates the said Moat never had in his name any of the shares of the said bank to a greater number than 495, and they only stood in his name in the way I have indicated in the other accounts, and for a period, in one instance, of six days. The usual way in all these accounts would be, there would be transferred a number of shares not greater than the number I have indicated, and on the same day these shares would be transferred. In none of the cases of either defendants, Kerr or Moat, did shares stand in their name or were held by them for any length of time, or as shares usually stand in the names of investors in the said stock, or parties, or companies who are in the habit of loaning monies on the said stock as pledgees thereof.

Osler, Q. C., Nesbitt with him, argued the case for the plaintiff. The plaintiff bought the shares, some for himself, some for his wife, and some for a client of his. He borrowed upon them from defendants. The plaintiff would have made a profit upon these transactions at the time the defendants sold out the stock, if he had got the prices the defendants sold for, of from \$14,000 to \$15,000. The defendants gave plaintiff's share to persons to whom they owed money, or were short, in their stock dealings with such clients. They never kept these shares for the plaintiff but transferred them to their own creditors. The plaintiff kept up his margins at the time, and never was in default, and the defendants had no right to sell his stocks. The plaintiff's purchases were on time. The stocks fell in October, and the defendants professed to be holding such shares for the plaintiff all that time. The accounts rendered to the plaintiff were fictitious. The defendants had no such stock in their possession. The result was, the plaintiff was brought into debt to the defendants in a sum of about \$4,162. The defendants had no right so to deal with the pledges to them, and the plaintiff is entitled to be paid the highest price such stocks bore between June and October. They claim they had the right to sell or repledge the stock of the plaintiff as they pleased, so long as they could replace it when called for and the advances paid which were made upon it—replace not the identical stock, but stock of the same bank—by purchase which they could make in the market, or otherwise. The plaintiff, through a broker, had bought the stock, and he did not deal as a broker with the defendants; he dealt with them as his bankers or brokers. The plaintiff bought the stock to make it scarce in the market, and the defendants knew that, and yet they put the stock he had bought upon the market, which kept the prices of the stock down. They were, in fact, rigging the market. The third finding is not supported by evidence that the plaintiff settled with defendants knowing his rights. The fourth finding, as to a settlement by pressure, is in favour of the plaintiff:

Kendall v. Wood, L. R. 6 Ex. 243; *Kneeshaw v. Collier*, 30 C. P. 265. The pressure was that the plaintiff would have been reported by the defendants to the stock exchange as in default, and he would have had his rights as a broker suspended while the reported default continued; and he had to submit to such settlement as he could effect. There was a misdirection on that point, or the matter was not fully explained to the jury: *Prudential Ass. Co. v. Edmonds*, L. R. 2 App. Cas. 487-507. The damages the plaintiff is entitled to appear from the following cases: *Exp. Dennison*, 3 Ves. 552; *Langton v. Waite*, L. R. 6 Eq. 165, 170; *Carnegie v. Federal Bank*, 5 O. R. 418; *Jones on Pledges*, secs. 421, 423, 511; *Taussig v. Hart*, 58 N. Y. 425, 430; *Levy v. Lock*, 89 N. Y. 386; *Johnson v. Stear*, 15 C. B. N. S. 330. There was no default of plaintiff, so no right of defendants to sell. Defendants disposed of the pledges solely for their own benefit. Defendants parted with the specific stock pledged; it lies on them to shew they had always stock on hand to meet plaintiff's calls.

S. Blake, Q.C., J. K. Kerr, Q.C., with him, for defendants. The agreement between the parties was proved, and must alone govern. The jury did not find the defendants were not to deal with the stock pledged by the plaintiff until after a two days' notice of call for payment made by the defendants. The custom was proved that the defendants had the right to deal with the stock as they pleased so long as they could return the stock when the plaintiff called for it. To deal with stock it must be transferred absolutely. You cannot raise money upon it otherwise. The plaintiff dealt with Priestman's stock just as the defendants dealt with the plaintiff's stock. Plaintiff made a call at one time on defendants for 600 shares, and as he paid the advances on them off, he got them. He made another call for his shares, but he was not able to redeem them; he was told the stock was falling, and was required to settle up; he could not redeem, so he settled accounts with the defendants by giving his notes for the balance found against him. In October the plaintiff and

Priestman knew the defendants were short of stock, and Priestman was sent to Montreal to try to raise \$250,000, and call on the defendants to replace their stock, thinking the defendants could not do it. The defendants thought that a sharp practice, so they called upon the plaintiff for their money, but he could not pay it, as he could not get the money in Montreal. The plaintiff at that time sent the telegram to Priestman about "Cox calling the boys, what shall I do?" The parties then settled, perhaps by pressure, but it was a legitimate pressure. The plaintiff complains of the defendants for putting the shares on the market which were pledged with them, as it operated to his prejudice. It was not the putting the shares on the market which broke the stock, it was the plaintiff calling upon the defendants to replace the stock. The plaintiff knew the defendants did not retain the stock, and were not to retain, as he says he had to give the defendants two days' notice of call for the stock to enable them to get the stock which he called for. The plaintiff knew that defendants were short, and because also he the plaintiff required two days' notice of a call for his advances. The defendants give the same explanation of the agreement as to their mode of dealing. The other brokers spoke as to the custom of brokers in dealing with the stocks as the defendants did. The plaintiff knew the defendants were short, and he admits he was not able to redeem the stock. The plaintiff was pleased to be allowed 150 for his own stock, and 148 for Priestman's. The plaintiff settled voluntarily. The plaintiff knew the defendants were only to carry the stock. As to pressure in obtaining a settlement, see *Kerr on Fraud*, 520, last ed.; *Langton v. Waite*, L. R. 6 Eq. 165; *Robinson v. Mollett*, L. R. 7 H. L. 804; *Nickalls v. Merry*, L. R. 7 H. L. 530. As to evidence of usage: *Lacey v. Hill*, L. R. 18 Eq. 182; *S. C.*, L. R. 8 Ch. 921; *Kimber v. Barber*, L. R. 8 Ch. 56; *Thacker v. Hardy*, 4 Q. B. D. 685-6, 693. *Langton v. Waite*, L. R. 6 Eq. 165, shews the same stock was required to be returned. See also 58 N. Y. 425, 443. The

defendants did know whose stock it was they got from the plaintiff until the time of the settlement. The finding of the jury upon the course of dealing between the parties was that there was no agreement how the stock was to be dealt with: that there was a two day call to each of the parties—to the one for the stock, to the other for the advances—and that was all. The defendants were long with Kerr and Moat, that is, they had a claim on them for stock, and they could get the necessary stock from them at any time. The custom also justified the defendants in dealing with the stock as they did, and that custom was well known to the plaintiff: *Morse v. Prime*, 4 Johnson's Ch. R. 490, S. C., 7 Johnson's Ch. R. 69; *Jones on Pledges*, secs. 503-509; *Price v. Gover*, 40 Maryland 102.

Oster, Q. C., in reply. The jury did not find an agreement. The defendants then rely on the custom, but Forbes denies any such custom as contended for. Gzowski speaks in like manner. They both say it is dishonest to sell stock so pledged. When sold there was none to be redeemed. The defendants say there were 2,500 shares, and at one time more than that after balancing their long and their short accounts. See *McNeil v. National Bank*, 55 Barb. 59. As to the settlement the question is this, did the plaintiff know at the time the defendants owed him about \$15,000? He says he did not know it, and the defendants say they did not tell him, and it was their duty to have given him full information as to all their dealings: *Lyon v. Talmadge*, 14 Johnson 501. As to repledging see *Robinson v. Mollett*, L. R. 7 H. L. 817.

September 12, 1884. WILSON, C. J.—At the close of the argument I made a note of the following points, which I thought would determine the case.

1. Had the defendants the right to deal with the stock as they did as a matter of law?

2. If not, had they the right to do so by the custom of brokers here, a custom which it is said existed to the plain-

tiff's knowledge, and to which it is said he submitted or which he accepted by his express or implied agreement to that effect?

3. If not had the plaintiff full knowledge of all the facts at the time he settled with the defendants; and was that settlement voluntary on his part, or procured by undue pressure on the part of the defendants?

After reading over the pleadings and evidence I think the answers to these questions will still settle the rights of the respective parties.

The case of the plaintiff is, that in the course of his stock dealings with the defendants he pledged with them 1,050 shares of \$100 each of the capital stock of the Federal Bank, upon which he received from the defendants an advance at the time of these respective pledges to an amount which was a certain per centage less than the then market value of the stock, the difference between the market value of the stock and the advance being retained by the defendants as a *margin*, as it is called, to meet any loss which might happen to the market value of the stock while it was held by the defendants; the plaintiff being bound, so long as the defendants held the stock, to keep them in funds to the extent of that margin in case of a fall in value; the plaintiff being entitled to two days notice from the defendants of their desire to be repaid the amount of their loan or advance, and the defendants being entitled to the like notice from the plaintiff of his desire to have a redelivery of the stock, such notice, in the language of the market, being termed, if the notice were given by the plaintiff, *a call for the stock*, and if given by the defendants *a call for the money*, the plaintiff, during the currency of the advance, paying an agreed upon rate of interest to the defendants. The defendants agree also that these were the terms and conditions of their agreement and dealings.

The parties differ only in the manner in which the defendants were to deal with the stock before a call was made by either party for the money or for the stock.

The plaintiff says the defendants might retain it them-

selves until they were paid their advances, or they might repledge it so long as they did not charge it with a greater debt than the plaintiff owed upon it, and they could sell it out if the plaintiff became in arrear for *margin*, or did not pay off his advances upon a *call* made.

The defendants say the course of dealing with the plaintiff was just as represented, excepting as to the mode of dealing with the stock upon which they made their advances. They claim they had a more extensive right and power over it than merely repledging it; that they had the absolute power of sale and disposition over it, to deal with it just as they pleased.

They say no arrangement was made between the plaintiff and themselves as to the way they were to deal with the stock, but they say the custom of the stock exchange authorized them to sell the stocks so pledged with them, and they were only required to replace that stock when called upon by the pledgor, not the identical stock pledged, but stock of the same kind and value, as there is no difference between one share of stock of the Federal Bank and another share of the same bank, and there are no means of identifying or earmarking any particular share of such a bank more than there is of identifying or earmarking one bushel of wheat thrown into a bin with some hundreds of bushels of the like quality of wheat, from any other bushel of the like kind of wheat.

Mr. Cox's evidence was :

Q. Then what you mean to say is this. If you buy stock for your client and receive your margin from him, and agree to receive a certain rate of interest, you are at liberty to deal with this stock as if it were yours? A. Yes.

Q. That is, you can place the stock on sale next day? A. Yes.

Q. You can repurchase it—you can lend it to another broker? A. Yes.

Q. And you can make any amount of profit out of it—all the profit is yours? A. Yes.

Q. Although pledged to you as a banker, and although

you do not tell your client, and he is paying you interest to carry the loan? A. Yes.

Q. So that if a man is buying stock for the purpose of making a profit on the rise, has that stock put upon the market against him, it is directly against his interest, is it not? A. Properly managed it is a grand thing for him, very much in his interest.

Q. Now if the system you practice is the regular one with 5,000 shares, there could be 20,000 or 30,000 on the market. A. Yes, that is the way the *short* puts a halter around his neck, if not smart enough to squeeze at the right time.

Q. In that way an illimitable number of shares can be placed on the market? A. Yes.

Q. You could deal with that stock not once but as often as you choose. A. Yes, as often as it comes back to you.

Q. And that is the result of the pledgee dealing with his pledge? A. Yes.

Q. Well then you say that no arrangement whatever was made with Mr. Mara by which you were to be entitled to deal with his pledge? A. No arrangement.

Q. It was the ordinary case of a loan on so much stock? A. Ordinary case.

Q. Now on the day after you got the 285 shares you dealt with that stock for your own purposes? A. Yes, made use of it, placed it where we wished. * * we placed it where we were short.

Q. Where you owed stock? A. Yes.

In other words you paid your debts with it? A. No, we got our money back.

Q. You paid your debt on stock with it? A. Yes.

Q. And on each separate transaction with Mara's stock you paid your debts with it? A. Yes, if that is paying our debts.

Q. You got the full personal benefit of being able to place that stock? A. Yes, * * and the margin Mara left in our hands, if there was margin.

Q. You have said in your examination Mara was not behind, [*i. e.*, in default at the time]? A. Yes. Cox said his firm was *short* in June and July 1,700 or 1,800 Federal Bank shares, and in August up to October short about 3,400 shares, and on the 9th of October being that much short they called for payment on 1,000, Mara's shares at that time being 1,380; and on the 15th of October they had bought as many shares as they were short upon.

Q. You had always the interest as a margin to protect you against a rise? A. Yes.

The accounts rendered by the defendants to the plaintiff of the transactions are stated in this manner, taking the account rendered on the 30th of June, 1883, as a sample of the debtor and creditor side of the plaintiff's account.

Dr.		Cr.	
June 1 Bal.	480 Fed'l	June 1 Divi'd	380 Fed'l
" 11 "	285 "	" 1 "	185 "
" 12 "	90 "	" 30 Bal.	
" 13 "	80 "		
" 15 "	500 "		
" 18 "	110 "		
" 30 "	interest		
	\$71,486 43		\$ 1,330 00
	44,000 00		28,445 00
	14,000 00		209,677 73
	12,400 00		
	79,000 00		
	17,380 00		
	586 30		
	<u>\$238,852 73</u>		<u>\$238,852 73</u>
June 30 balance.....	\$209,077 73	1,360 Federal 158½.....	\$215,900 00
			209,077 73
			<u>\$ 6,822 27</u>

In this account the plaintiff is credited with the Federal Bank shares which he assigned or pledged to the defendants, and he is properly charged with the money which he received upon them.

The debit side shows advances have been made upon 1,545 shares. The credit side show 185 shares in the June account, and 1,360 shares from a previous account, making together the like number of 1,545 shares.

The account would have been plainer if the 1360 shares had been entered to the credit before any balance was struck, but the result of these transactions was, that the plaintiff had at his credit the sum of \$6,822.27 at the end of the month.

The account is correctly stated so far as it goes, but it does not show the whole of the transaction. It represents the stocks as still in the hands of, or, in exchange phrase, as being still *carried* by the defendants for the plaintiff, and for which the plaintiff is therefore chargeable with interest upon the payments made to him, for which the defendants are, as the account shows, still in advance to

him upon these shares ; and in that respect the account, by not representing the whole transaction, does not represent the truth.

The further fact which the account should have shown, in order to have given the whole transaction, is, that after the defendants made these advances they sold the stocks which are credited to the plaintiff, and in that way made good to themselves the payments which they had made to and charged against the plaintiff ; so that they were no longer in advance to the plaintiff, or creditors of his for any other or greater amount than the sum they had obtained on these sales may have fallen short of the advances they had made to the plaintiff.

If the defendants did not receive the money upon these sales of the plaintiff's stock, they received the money's worth for them by giving them in payment of money or stock borrowed by them from others, or for some other equally beneficial personal advantage.

That is what the account should have shown, for it was the actual state of things.

The want of that statement makes the account imperfect and misleading.

The defendants say they were at liberty to dispose of the plaintiff's stock for their own personal gain and profit, and to replace the number of shares which he had given to them whenever he called upon them for the return of them : that they could deal with the stock when they got it as their own absolute property, and it was sufficient if they could command in the market shares for the plaintiff when he demanded them.

By such a mode of dealing the plaintiff, it is manifest, has lost his stock, of whatever value it may be, and he has the personal security only of the defendants in its place.

Is that the nature of the agreement between the parties ? If it be, it was not by reason of any special agreement, for the defendants represented that there was no arrangement whatever made respecting the way the stock was to be dealt with by the defendants. Whatever agreement there

was about it, was an agreement by implication, for the law infers an agreement of some kind to have attached to dealings of that nature.

That implied agreement the defendants say was, that they should deal with the stock in the manner they did deal with it, because they say the plaintiff must have known from the beginning they were short of their stocks, that is, as applied to this particular case: that the plaintiff must have known that defendants were indebted to others in and for this kind of stock, and were therefore under the necessity of using it in reducing their liabilities to those others; and because the plaintiff must have known the defendants could not have reserved so small a margin, and dealt with the plaintiff on any other terms; and because also, I presume, the plaintiff with such knowledge suffered the defendants to continue on in their dealings with his stock without objection; and because he gave them specially two days after he should make a call upon them for the stock, to get it in.

I think the defendants, although the plaintiff may have known they were short of this stock, have not proved the plaintiff knew they were absolutely disposing of his stock for their own benefit; nor that there was any absolute necessity they should use his stock in that way; nor that the smallness of the margin required they should so use it; nor that the plaintiff knowingly suffered the defendants to continue that course of dealing with his stock; and it would require the very clearest proof of these facts to warrant the very large inference sought to be raised from them to constitute such an implied agreement.

The defendant Cox said there was nothing special in the manner of carrying on these transactions between the plaintiff and the defendants. They were carried on in no other way than as ordinary transactions. That may mean they were conducted on the principles regulating such business operations in the stock exchange, according to the custom of the place and business.

What, then, was the evidence of the custom in such transactions?

There were three stock brokers, members of the Exchange, called by the defendants to prove the custom ; Mr. Forbes, Mr. Gzowski, and Mr. Farley. Mr. Forbes was asked : " Amongst brokers in dealing with each other, making purchases one from the other, where stock is held on margin, what is the custom in reference to the brokers in the way in which they deal with shares ? " He answered, " Sometimes we sell the stock. " In his cross-examination he said, " We have a right to borrow money where we like from a broker or from a loan institution : we transfer the stock to secure it. There are times it is carried, the broker being responsible to make good the deal. When stock is transferred to a broker he has to borrow money ; we cannot carry stocks. Shares are not marked for any particular customer, they are like so many bushels of wheat. The person who gets a broker to carry stock would naturally understand we could do what we choose with the stock : we cannot carry stock, we have got to raise the money. So far as I have heard the evidence, I have not seen that it is proved they sold the stock at all. The broker has no doubt a right to dispose of the stock in any way he chooses, because he cannot carry the stock with his own money. So long as the broker is able to meet the demands on him for the stock transferred to him, he deals with it as he likes. " In cross-examination he was asked.

Q. I understand you to say, if your client comes to you and buys so much stock and puts up a margin, and you make him a loan and charge him interest on it, and carry the stock for him, that you are at liberty to sell that stock the next day, and to put the money in your pocket ? A. I have said I would have felt at liberty to do what I choose with it.

Q. Do you say that is right ? A. I have not said I would do that, nor that I have ever done it. I say I do not do it.

Q. You would not do it. Is it right, do you say it is wrong ? A. I say as I said before, a broker has a right to do as he chooses.

Q. Do you consider it right to do it ? A. I do not know I am bound to answer that.

Q. You said it was the broker's right to raise money on the stock in that way? A. Any way he chooses.

Q. That is to say he has a right to get a loan on it to the extent he had loaned his client, and no more? A. Yes.

Q. Would you, having made an advance on stock of 90 per cent., consider yourself justified in pledging it for 95 per cent.? A. Oh, no! Still we would have the right to do it.

Q. If you failed, and the stock was pledged for 5 per cent. more, all he would have would be your personal obligation for it? A. That is all he has for it anyway.

Q. Do you say that is all he has got, suppose the stock is repledged? A. He looks to me, not to any body else.

Q. For the stock and for the margin? A. Yes. The stock is ours to deal with for raising money on it?

Q. But only for the purpose of raising money. A. Certainly.

Q. Only for the purpose of raising money to carry the loan if your client wants it carried? A. Certainly.

Q. Now, we are not mistaken about that? A. You are not mistaken about that.

Q. Would you think it honest or right to take that stock and bull and bear the market with it—to make use of it for your own personal advantage—to make a break or corner? A. I do not think so.

In re-examination he said:

Q. Is it not a well understood practice and known custom among brokers for the one who carries stock to deal with it as he likes? A. It is.

Q. When a broker is *short* on the market, and a broker who is *long* pledges stock with him, or gets it carried by him, what does he understand will be done with that stock—does he understand it will be dealt with? A. The broker would be at liberty to do what he chose with it.

Q. Getting a low rate of interest—getting money carried by a broker known to be *short* on the market, what would he (the customer) understand would be done with the stock? A. He would understand he (the broker) would locate it wherever he was short.

The Chief Justice—Q. Do I understand you to say, supposing you had done exactly what Mara did, buy a large quantity of stock, he had not the means to pay for it, before he bought he went to Cox and asked him if he could lend him money to buy it, Cox finds the

money, Mara buys the stock and transfers it to Cox, what would you expect in the nature of things Cox would do—do what he is said to have done here, go on dealing with the stock? A. I would think he was *short* of the market, and that he would use the stock rather than replace it in another way.

The Chief Justice.—Q. Mara was buying for several clients, he goes to a broker and says will you advance, he gives that transfer to the broker; the question is, has that broker dealt improperly with the stock? A. It is not. As I have said, I cannot see he has made any sale yet.

Osler—Q. I undertake to say Mr. Forbes will not say it is honest for him to do it, to make sale of a pledge in his hands for his own purposes? A. No, it is not.

The Chief Justice.—Do you mean Cox's sale, though he was a perfectly solvent man, and able to answer, would you say it was not honest? A. I would not consider it right.

Q. If he sold it, it was dishonest? A. That was not the question, that is when you buy stock for a client.

Q. Mr. Mara is a client here? A. But he is not a client.

Mr. Gzowski said:

"I have heard the way in which the stock came to be placed, both parties agreeing that Cox was *short in the market*; the custom among brokers is, that the stock would be dealt with as Mr. Cox has done. As a broker I would undoubtedly expect it to be dealt with in that way. There is no custom to keep any particular lot of shares separate from any other of the like shares."

In cross-examination.

"The client's name as purchaser appears on this bought note, in that way the stock is identified.

Q. Do you *deal* with the stock you take as bankers?

A. If you mean by selling, no.

Q. When you loan as a banker on stock it is immaterial whether the customer is a broker or not, you would not disturb the pledge and make use of it for your own benefit?

A. Certainly not. That is for a client.

Q. And you would treat a broker as a client, can't you?

A. We can. He does his own business generally.

Q. A man deposits with you as a banker shares to secure 90 per cent. of an advance, and you charge him interest on it, and you take a transfer of the shares to yourself, would

you undertake to sell these shares or deal in them for your own benefit? A. No, sir.

Q. Would you think it wrong to do so? A. I would not do it. If your client allowed you to do it you could do it.

Mr. Farley said that a broker short, taking a transfer of stock, would be understood to get rid of it, to put it on the market, he would do as he liked with it.

Cross-examination.

Q. Do you think it is right for a pledgee of stock to sell it, to deal with it on the market? A. It has been done.

Q. Wrongfully? A. I have thought so.

Q. And so contended? A. Certainly, I might think it was wrong if I was long of the stock, but it would be necessary. I could not help myself.

Q. They do it improperly? A. That is for the court to decide. It is done all over, though.

Q. Would it hurt the stock for a pledgee to put it on the market? A. Oh, certainly, no doubt about that."

From this evidence of custom not much can be made in support of it. Not one of the witnesses ever sells the stock pledged as the defendants did. Mr. Forbes thinks it wrong to do so. Mr. Gzowski thinks it wrong for a banker to do so. And Mr. Farley thinks it wrong of the broker so to act; but it is sometimes necessary to do so, and it is done all over, he says, although not one of them has said he had ever done it, or would do it.

The evidence as to custom to support such a practice utterly fails. But if it had been proved it could not have been regarded.

The custom claimed is this, that the defendants, who have lent to the plaintiff, according to the account above stated, a sum of about \$238,000, shall have the right to sell the stock pledged with them in security for the repayment of that loan, and deprive the plaintiff of his property in it, and to substitute their own personal security in its place: that the defendants shall, after getting the price of the stock or the personal benefit of it to the full amount of the loan, or it may be to a greater amount than

their loan, be at liberty to keep up a fictitious account with the plaintiff of the stock, as if they still had it in their possession. and to charge the plaintiff the interest upon their advances, although every dollar of their loan has been returned to them by reason of the sales they have made : that the defendants should take to their own use the profit they may make upon the stock in case they sell it on a rising market ; and that they discharge themselves of their liability by returning to the plaintiff an equal number of shares whenever they please, however depreciated the stock may be at the time, and however great a profit they may have made upon it at the time when they sold it.

There is not and cannot be such a custom, although the parties may expressly agree to anything of that kind if they please, and if they know what they are about ; but the defendants admit there was no such agreement at any time between them.

The law seems to be quite in accordance with the ordinary course of business and the principles which govern agents generally in the management of the property of others which is entrusted to their care.

A broker is the agent of his customer.

As his business frequently requires he should advance large sums for his customers, it is not only reasonable but necessary he should have the power to repledge their property pledged to him for the benefit and the interest of his customer : *Vanhorn v. Gillbough*, 21 Am. Law Register, N. S. 171.

An agreement to sell stock is inconsistent with the contract of pledge : *Lawrence v. Maxwell*, 53 N. Y. 19 ; *Jones on Pledges*, sec. 503.

The power "to use, transfer, or hypothecate" stock may empower the pledgee to sell it before maturity for his own use, although he holds it as collateral security, he being by the contract obliged, on payment or tender of the loan, to return an equal quantity of the stock, but not the specific stock : *Jones on Pledges*, sec. 501.

So also where the pledge consisted of gold, and by arrangement the broker, for his margin of 10 per cent., took stock in place of gold, it was inferred the broker might use the stock taken for his margin as he might have used the gold: *Jones on Pledges*, sec. 502, citing *Laurence v. Maxwell*, 58 Barbour 511, 64 Barbour 102, and other cases.

So a practice between parties may be supported by which a broker has been allowed by his customer to repledge the margin left in his hands for his own use: Same cases.

When the pledgee had given a writing stating that he held the stock as collateral security, and that he might sell it *on one day's notice*, parol evidence of an agreement that the pledgee might use the stock was held to be inadmissible: *Fay v. Gray*, 124 Mass. 500; *Allan v. Dykers*, 3 Hill N. Y. 593; *Jones on Pledges*, secs. 502-510.

It is held to be a conversion by the pledgee to transfer the stock to a creditor of his own, although he has a greater number of shares to his credit on the books of the company at the time: *Ibid.*

The identical shares pledged need not be retained by the broker, so long as he keeps in his possession ready for delivery an equal number of the same kind: *Jones on Pledges*, sec. 508.

The stock on hand by the broker should be sufficient to answer all demands upon him, and not only to answer the stock of a particular customer, unless the stock on hand be the specific stock of that customer: *Jones on Pledges*, secs. 509-511. The use which the pledgee makes of the stock must be consistent with the general rights of the pledgor and his ultimate right to redeem: *Lawrence v. Maxwell*, 53 N. Y. 19; *Taussig v. Hart*, 58 N. Y. 425.

The case of *Langton v. Waite*, L. R. 6 Eq. 165, shews the custom, which in that case was held not to be proved, would not, if proved, justify the broker in selling the property of his customer while there was no default on his part.

In *Thacker v. Hardy*, 4 Q. B. D. 685, the right or

usage of a broker who had bought shares with his own money for a customer, to sell such shares upon the death, bankruptcy or insolvency of the customer, was supported, although before the day fixed for payment, subject to the broker accounting for any loss the principal may have suffered by the sale being made before the day.

In *Ex parte Cooke, In re Strachan*, 4 Ch. D. 123, a broker is said to be an agent in whose hands money or other property is placed to be used in a particular way; he is not a banker.

Upon a consideration of the whole case, I am of opinion there was no custom proved to warrant the defendants in selling the plaintiff's shares, which he held in his own name, and did not acquire through the defendants, although, if he had so acquired them, it would have made no difference in that respect.

I am also of opinion that if a custom had been proved that the defendants might sell the plaintiff's shares for their own use while the plaintiff was not in default, it could not have been supported. And I am further of opinion that the sale made by the defendants of the plaintiff's stock, not being nor pretended to have been by express agreement, was a wrongful and invalid act, of which, although wrongful on the part of the defendants, the plaintiff and in this action is entitled to take advantage, and to recover from the defendants the prices at which they sold his stocks, unless the plaintiff be precluded from recovering by reason of the settlement which he afterwards made with the defendants, when he gave them his promissory notes on closing these transactions.

That settlement, I think, is not binding upon the plaintiff, because it does not plainly appear he was aware, and it is not pretended that he was informed by the defendants they had sold his stock in the manner and for their own personal use and benefit, and that they had made a profit upon it.

The plaintiff knew the defendants had parted with his stock, but not that they had *dealt* with it, according to

his own expression—meaning, as he says, that they had sold it for their own use. He thought only they had repledged it, and that the stock was in their possession at the time; and it is difficult to understand how he could have supposed anything else when they were charging him interest all the time upon their advances, for he could not possibly have known they had recouped themselves for their money and all their advances long before the time of the settlement, or that they would continue to call upon him for further margins while they had at that time his, the plaintiff's, own money in their pockets.

The jury found there was no fraud or false representation on the part of the defendants in procuring the settlement with the plaintiff, but they found there was evidence of pressure.

There was upon the evidence concealment, according to the defendants' own testimony, of the time, terms and manner at, upon, and in which the defendants had parted with the plaintiff's stock; and that was fraud. But the jury may have thought there was no moral as distinguished from legal fraud, if there be such a distinction, as I think there is, when brokers were found to approve to some extent of such a practice. *Misrepresentation* perhaps there was not, by words at any rate, but the accounts themselves were a misrepresentation of a very complete kind.

As I am of opinion the plaintiff is entitled to recover upon the merits, I will go over again the answers of the jury, to see whether the plaintiff is entitled to have the verdict entered in his favour, or whether there must be a new trial.

1. The jury said there was no agreement or understanding as to how the stock was to be held or disposed of, other than the two days' call.

That is a finding for the plaintiff, and more strongly so because of the two days' call which the jury find the plaintiff is entitled to, and which the defendants also, I may say, admit the plaintiff had expressly bargained for.

2. The jury found the defendants had not the stock ready to hand back to the plaintiff. That is a finding in favour of the plaintiff.

3. That the plaintiff settled with the defendants with full knowledge of his position and rights.

4. That there was no fraud or misrepresentation on the part of the defendants by which the plaintiff was induced to settle, but there was pressure to obtain a settlement.

I join these two answers because they relate to the settlement.

The third finding is plainly against the plaintiff. It is that "the plaintiff had full knowledge of his position and rights when he settled." And the fourth answer is, that the settlement was procured "without fraud or misrepresentation," but by *pressure*; that is, it was a fair settlement in all respects excepting that there was pressure to obtain it applied by the defendants.

What is the effect, then, of the third and fourth findings? "That the settlement was a fair one, excepting that pressure was applied to obtain it?" That pressure can only mean that if the plaintiff did not settle he would be reported to the Board of the Stock Exchange as a defaulter, and such a pressure as that is about the strongest which could have been applied.

I am inclined to think it is a pressure which the defendants might not unlawfully employ to bring to a close their dealings by a fair settlement, and that these two findings, at any rate, were rightly entered for the defendants, and if so they are an answer to the whole action.

5. The jury also found there was no breach of any agreement or understanding between the parties, which they might well find without prejudice to either party, as the agreement was interpreted to them.

But I am of opinion there was a breach of the agreement between them by reason of the defendants selling before the expiry of the two days' call for payment, which provision was equivalent to an agreement that they would not sell until such a call had been first made. In any other respect the finding is of no effect, as neither party pretends there was any other agreement or understanding between

them. See the answer of the jury upon this point to the first question.

The verdict cannot therefore be entered for the plaintiff because of the answers of the jury to the third and fourth questions; but in my opinion they are so plainly against the law and the evidence that the verdict and the judgment for the defendants must be set aside and a new trial granted to the parties, without costs.

OSLER, J. A.—I am of opinion, for the reasons stated in the judgment of the Chief Justice, that there should be a new trial between the parties.

New trial, without costs.

[COMMON PLEAS DIVISION.]

CAMERON ET AL. V. THE CANADA FIRE AND MARINE INSURANCE COMPANY.

Insurance—Proofs of loss—Delivery as soon after fire as possible—Actual cash value of property—Property situate outside of Ontario—R. S. O. ch. 162.

The Fire Insurance Policy Act, R. S. O. ch. 162, does not apply to property outside of Ontario.

One of the conditions of a policy of insurance against fire on ice and packing, contained in an ice house situated in the State of Wisconsin, provided that the proofs of loss should be delivered "as soon after the loss as possible." The fire occurred on the 17th September, 1881, and the proofs of loss were not delivered until the middle of May, 1882, when they were objected to, and returned to the insured, who redelivered them in the same state in the month of July following. The only reason given for not delivering them sooner was, that it was not convenient to do so.

Held, that the condition was not complied with.

By the policy it was provided that the loss or damage should be "estimated according to the actual value of the property insured, that is, what it could have been actually sold for in cash at the time of loss;" and the condition on the policy required that the affidavit of loss should state the actual cash value of the property. In the printed proofs of loss, which were used, the words "actual cash value" were struck out, and a statement substituted giving the cost of the property in 1880, a year previous to the insurance being effected.

Held, that this was not a compliance with the policy and condition.

Held, therefore, there could be no recovery on the policy.

THIS was an action on a policy of insurance against fire tried, before Osler, J. A., without a jury, at Hamilton, at the Spring Assizes of 1884.

A. Bruce, (of Hamilton) for the plaintiffs.

Osler, Q. C., and *Laidlaw*, (of Hamilton) for the defendants.

June 6, 1884. OSLER, J. A.—The action is upon a policy of insurance, dated the 17th May, 1881, whereby the defendants insured the plaintiffs against loss or damage by fire to the amount of \$2,000 on ice and packing contained in two south sections of frame sectional ice house building situated in the city of Oshkosh, Winnebago County, in the State of Wisconsin, from the 13th May, 1881, to the 13th May, 1882,

subject to the conditions endorsed upon the policy, and made a part thereof, the amount of loss or damage to be estimated according to the actual value of the property (deducting a suitable amount for depreciation from location, use, or otherwise,) that is, what it could have been actually sold for in cash at the time of such loss or damage, to be paid in sixty days after the loss should have been ascertained in accordance with the terms and conditions of the policy, and satisfactory proof should have been made by the insured and received at the office of the plaintiffs in Hamilton.

The defendants pleaded the non-performance of certain conditions endorsed on the policy, as a defence to the action.

The building which contained the property insured was burned on the 17th September, 1881.

Notice of the fire was received by the defendants on the 20th September, 1881, and that was the only communication made to them on the subject until some time in May, 1882, when one McKay, on behalf of the plaintiffs, handed to their secretary some papers relating to the loss. They were not examined and were returned by him to McKay two or three days afterwards. These papers were again delivered to the company as proofs of the loss under the condition of the policy, on the 14th July, 1882, and were returned on the 17th July, with a memorandum endorsed thereon, that they were objected to as not having been delivered in proper time under the conditions, and as being otherwise in themselves insufficient, and that the claim having been reported as a fraudulent one, would be resisted on the merits, and upon all formal grounds of defence, including defects in time of the delivery of proofs and contents thereof.

No other proofs of loss were delivered, and the action was commenced on the 16th September, 1882.

The claim was resisted on substantially the following grounds:

1. That the proofs of loss had not been rendered as soon as possible after the fire.

2. That the proofs of loss were defective, in not stating the actual cash value of the property destroyed as required by the conditions.

3. That the plaintiffs had made no attempt to save or protect the property insured from damage at and after the fire.

4. Fraudulent over-valuation and fraud, and attempting to defraud by false swearing as to the loss by the fire.

5. That the melting of the ice from exposure after the destruction of the ice house was not actual and immediate damage or loss by fire, within the meaning of the policy and conditions.

The property insured not being in Ontario the Fire Insurance Act, R. S. O. ch. 162, does not apply, and we have to deal merely with the contract the parties have entered into.

First, with regard to the objections relating to the proofs of loss.

The 11th condition requires the assured, as soon after the loss as possible, to render a particular account thereof, signed and sworn to by him, stating, among other things, the actual cash value of the property insured, that is, what it could have been actually sold for in cash at the time of the fire.

The proofs of the loss rendered and relied on consisted of (1) an affidavit of George Cameron, a member of the firm of D. R. Cameron & Co., the assured, sworn on the 30th September, 1881, the third clause of which was as follows: "That the actual cost of replacing the property insured is the sum of \$9,540 at the time of the fire, as will appear by the annexed schedule A. shewing a full and accurate description of each kind of property, and the value of the same, with the damage or loss on each stated separately." This clause was filled up in a printed form, substituting the expression "actual cost of replacing" for that of "actual cash value," the latter being scored out.

The "schedule A" annexed was another affidavit of Cameron, sworn to on the same day, stating as follows: "That the actual cost of replacing the ice and packing contained in the two south sections of the Frame Sectional Ice House Building," &c., "as the same was at the time of its total destruction by fire, September 17th, 1881, would be as follows, to wit:

6,900 tons of ice at \$1.25.....	\$8,625
20 car loads of saw dust at 20 cents....	400
80 days' labour, hoisting saw dust, at \$1 50.....	120
40 horses at \$2 00.....	80
6 months' services of watchman at \$45..	270
Buckles, ropes, &c.....	45
Total.....	\$9,540

That the above amount is the actual cost of replacing the property insured and described in the said policy at the time of the fire.

That the ice and packing insured in the said policy was put in during the year 1880, and that the actual cost of the said ice and packing the same at the time it was put into the ice house, was as follows, viz:

6,900 tons of ice at 45 cts.....	\$3,155
20 car loads of saw dust at 20.....	400
80 days' labour, hoisting saw dust, at \$1 50.....	120
40 horses at \$2 00.....	80
6 months' service as watchman at \$45..	270
Baskets, ropes, &c.....	45
	<hr/>
	\$4,070

That this amount was the actual cost of putting in the ice and packing in the said ice house.

A further affidavit of Cameron, sworn on the 9th December, stated that the amount of ice contained in the ice house destroyed was 6,900 tons, and that the value of the same with packing, was \$8,625. That the amount of ice (left) after the fire was about 2,000 tons, and that the value of the same was "comparatively" nothing.

An affidavit of W. A. Searls, sworn on the 9th December, 1881, ice packer, who had packed the ice in question, stated that at the time of the destruction of the ice house there was about 6,000 or 7,000 tons of ice in the same according to his best knowledge and judgment, and that the value of the same was about \$7,000."

And an affidavit of R. E. Daniel, an insurance agent, sworn the 1st February, 1882, stated that he had visited the ruins of the ice house, on the 18th September, for the purpose of ascertaining the damage done to the ice house: that the covering on the ice was burned off, leaving the ice bare and unprotected from the sun's heat, causing it to honeycomb, and, in his judgment, it was at that time unmarketable and a total loss.

One of the plaintiffs was examined, and said that the only reason they did not deliver their proofs of loss earlier was that it was not convenient to do so. They had meant to go down to Hamilton and discuss the matter with the officers of the company.

It was not contended that there had been any waiver on the defendants' part of their right to the performance of this condition, or that the plaintiffs were in any better position by reason of their delivery to the defendants' secretary of the proof papers, or any of them, in May, 1882.

In *Mann v. Western Assurance Co.*, 19 U. C. R. 314, a somewhat similar condition was in question. The fire occurred on the 3rd July, 1858, and the full proofs of loss were not presented to the defendants until the 1st June, 1859, an interval of 11 months. A former action had been brought in respect of the same loss, in which the plaintiff was nonsuited, on the ground of the insufficiency of the proofs. When the first papers were delivered the defendants had objected to them, and others were, a few days afterwards, delivered to them, to which no objection was made until the first trial.

It was held that "as soon as possible" must be construed to mean within a reasonable time under the circumstances.

The circumstances on which the majority of the Court relied, in upholding the verdict of the jury, were that when the first affidavit and certificate were delivered to the agent (and they were delivered during the month in which the fire occurred) he kept them, and though he afterwards wrote to say that they were defective, he did not say what the defect was; the parties had, in the interval between sending the first and last set of papers, been corresponding in regard to the loss, and the defendants had placed their defence upon another ground apart from the technical objections and going to the merits of the claim.

Sir John Robinson held that the question was one proper to be left to a jury, observing that it was not a case in which the time could be said to have been fixed by any rule of law, or any course of judicial decision. And he added, at p. 323: "I do not mean to say that where there are no circumstances accounting for the delay, and where the delay has been great, it may not be right in the Judge to tell the jury that the statement has clearly not been furnished in time, according to the condition of the policy."

In *Hydraulic Engineering Co. v. McHaffie*, 4 Q. B. D., 670, Bramwell, L. J., says, at p. 673: "To do a thing 'as soon as possible', means to do it within a reasonable time, with an undertaking to do it in the shortest practicable time."

If the words of this condition have any force or meaning at all it appears to me that the defendants have the right to invoke their application in the present case. It is one of the terms of their contract that the proofs of loss shall be delivered as soon after the fire as possible, yet the fire having occurred on the 17th of September, and proofs of loss having been made out with sufficient deliberation in that month, and in the following months of December and February, no attempt was made to communicate them to the defendants until the middle of May, 1882, and they were, in fact, delivered in the same condition on the 14th

July, 1882. There was no correspondence between the parties on the subject in the meantime, nor, so far as I can see, any reason whatever for the delay, except that given by one of the plaintiffs, that it was not convenient to attend to the matter. I cannot say that the condition is meaningless, or satisfied by a delivery of proofs of loss just before the action is brought; nor do I think the expression "as soon as possible after the fire" is the equivalent of a reasonable time before the commencement of the suit. What the defendants, as insurers, are entitled to, and what is very important to them to have, is the information required by the condition, as soon as possible after the loss. They may desire to make enquiries as to the origin of the fire, and the circumstances surrounding it at the time and immediately preceding and following it, and unnecessary delay in furnishing the information means difficulty in testing it, gives time and opportunity to cover up fraud, and in other ways is calculated to place the insurer at a disadvantage. Sitting as a judge of fact, and having deliberately considered the circumstances of this case, I find that the proofs of loss were not delivered as soon as possible, that is to say, within a reasonable time after the fire.

I am also of opinion that the proofs of loss delivered were defective. The policy expressly provides that the loss or damage is to be estimated according to the *actual value* of the property, that is, what it could have *actually been sold for in cash* at the time of the loss, and the condition requires that the affidavit of loss shall state the actual cash value of the property. Instead of complying with the terms of the condition the assured deliberately refrain from stating the actual cash value, striking out that expression from the printed form and substituting therefor a statement of the cost of replacing the whole property destroyed, and of the cost of the ice and packing in the previous year, which is something very different. One of the affidavits of George Cameron states that the value of the ice and packing was \$8,625, and Searls states

that the value was about \$7,000 whether the quantity was 6,000 or 7,000 tons; but neither is that a compliance with the condition.

I am willing to admit that, to some extent, actual cash value is a matter of opinion, especially when there is no market, or a very limited one, for the commodity; but that is not a reason why the assured should not, under oath, pledge his honest belief as to what has been stipulated for, instead of using so elastic and indefinite a term as "value." From the evidence I have no idea that the actual cash value of the property was anything like the *value* sworn to.

On these grounds (it is not necessary to consider any others) I think the defendants are entitled to succeed, and though they succeed on a technical or formal defence I am obliged to say, after a perusal of the evidence, that I am not convinced that any substantial injustice has been done.

I direct judgment for defendants with costs, other than the costs connected with the Oshkosh commission.

See *Mann v. Western Assurance Co.*, 19 U. C. R. 314, 329; *Morrow v. Waterloo County Mutual Fire Ins. Co.*, 39 U. C. R. 441; *Citizens Fire, &c., Co. of Baltimore City v. Doll*, 35 Maryland 89; *Columbia Ins. Co. of Alexandria v. Lawrence*, 10 Peters 507, 514; *State Ins. Co. v. Maackens*, 38 N. J. 564; *Brink v. Hanover Fire Ins. Co.*, 70 N. Y. 593; *Winne v. Illinois Central R. W. Co.*, 31 Iowa 583, at p. 587; 12 Insurance Law Journal, 723; *McCuaig v. Quaker City Ins. Co.*, 18 U. C. R. 130.

[COMMON PLEAS DIVISION.]

MCKAY v. CUMMINGS.

Malicious arrest—General issue by statute—Necessity of pleading—Evidence.

In an action for malicious arrest the jury found a general verdict for the plaintiff, with \$200 damages. They also specially found, in answer to a question put to them, "that the defendant honestly believed that his duty as constable called upon him to make the arrest." The learned Judge thereupon entered a nonsuit, holding that the defendant should have received notice of action. The general issue by statute R. S. O. ch. 73, was not pleaded, and the statement of defence was not framed so as to enable the defendant to avail himself of it; and the Court were of opinion under the facts, set out below, that there was no evidence on which the special finding of the jury could be supported.

Held, that the nonsuit must be set aside, and judgment entered for the plaintiff, with \$200 damages as assessed.

If the statute has not been pleaded honest belief is no defence, if there existed no reasonable ground for such belief.

ACTION for malicious arrest.

The cause was tried before Osler, J.A., and a jury, at St. Catharines, at the Spring Assizes of 1882, when a nonsuit was entered.

The facts fully appear from the judgment.

During the Easter sittings *J. K. Kerr*, Q. C., obtained an order *nisi* to set aside the verdict for the defendant, and to enter a verdict for the plaintiff.

During the same sittings, May 29, 1884, *Osler*, Q. C., shewed cause. There was clearly no right to arrest the plaintiff. The doing so was a mere wanton act on the part of the defendant. The defendant, therefore cannot say that he was acting in the *bona fide* belief that what he did was in the discharge of his duty, and therefore he was not entitled, under the statute, to notice of action: *Friel v. Ferguson*, 15 C. P. 584. The defendant cannot set up the statute as he has not pleaded it.

[*ROSE*, J. This was expressly decided last term in *Verratt v. McAulay*, not yet reported (a).]

J. K. Kerr, Q. C., contra. This is an action against the

(a) Since reported in 5 O. R. 313.

chief of police as chief of police. The defendant pleads "not guilty," and he is entitled under such plea to the protection of the statute, and therefore to take advantage of any defence given him by it, without specially pleading the statute. If, however, it is necessary to specially plead the statute, leave should now be granted to add such defence. He referred to *Cottrell v. Hueston*, 7 C. P. 277; *Allen v. McQuarrie*, 44 U. C. R. 62, 67; *Booth v. Clive*, 10 C. B. 827; *Neill v. McMillan*, 25 U. C. R. 485; R. S. O. ch. 73, secs. 1, 10, 20.

June 26, 1884. ROSE, J.—This is a motion for an order absolute to set aside a judgment of nonsuit entered at the trial before Osler, J. A., and a jury, at the sittings of the Court in St. Catharines in May last.

The action is brought against the chief constable of St. Catharines for malicious arrest, and a general verdict was given for the plaintiff, with \$200 damages. The learned Judge having left to the jury during his charge the question, "Did the defendant honestly believe that his duty as a constable called upon him to make the arrest?" the jury were directed to again retire to answer such question, and subsequently returned with an answer as follows: "We, as a jury, say 'yes.'"

Thereupon the learned Judge entered judgment of nonsuit, without costs, and without prejudice to another action, stating that he so entered judgment of nonsuit, on the ground that there was no notice of action.

The points submitted for our consideration are:—

1. Whether the statement of defence is so framed as to enable the defendant to avail himself of the protection of the statute, R. S. O. ch. 73, either as to sections one or ten?

2. Whether there is any evidence on which the special finding of the jury can be supported?

The defendant might have pleaded the general issue by statute, under which he would have been at liberty to raise any defence available by that statute, but with such plea he would not have been able to plead any other

defence without the leave of the Court or a Judge: O. J. Act, Rule 145.

If he desired to raise any defence under the statute, it was necessary to specially plead it: Rule 147.

Want of notice of action must be raised by plea: *Verratt v. McAulay*, 5 O. R. 313.

As to pleading want of stamps being unnecessary, see *Chapman v. Tufts*, 8 S. C. R. 543.

If the statute has not been pleaded, then honest belief is no defence, if there existed no reasonable ground for such belief: *Hermann v. Seneschal*, 13 C. B. N. S. 392, at p. 399, per Sir William Erle; and if want of notice of action has not been pleaded, it is immaterial that the defendant shew himself entitled to notice.

The statement of claim charges wrongful and malicious arrest and imprisonment.

The defendant pleaded: 1. Not guilty. 2. Specially denying that the arrest and imprisonment were wrongful, malicious, or without reasonable or probable cause, and alleging "that the plaintiff was acting in an improper, excited, and disorderly manner, and causing a disturbance by screaming and swearing in a public street in the city of St. Catharines, and impeding peaceable passengers, whereupon the defendant, as such chief constable, finding the plaintiff so acting, caused a constable of the police force in said city to take the plaintiff to the police station, and to detain him there, as he lawfully might: that while in the said station the plaintiff became calm, and it appeared to the defendant that the plaintiff had acted in the said improper, excited, and disorderly manner, and caused the said disturbance, through nervous excitement, the defendant thought it better to liberate him after such excitement had subsided, rather than to take him before the police magistrate for such conduct, and the defendant accordingly liberated the plaintiff upon his becoming calm: that the defendant's action in the premises was done by him in the performance of his public duty as such chief constable.

Unless the last clause can be construed to be a plea of the statute, it is clear that the other statements or allegations cannot.

It was not intended to introduce laxity in the mode of pleading by the new rules, although it is to be feared that has been the effect. See remarks of Jessel, M. R., in *Thorp v. Holdsworth*, 3 Ch. D. 637, at p. 639; of Brett, L. J., in *Philipps v. Philipps*, 4 Q. B. D. 127, at p. 133, and of Grove, J., in *Stokes v. Grant*, 4 C. P. D. 25, at p. 27.

The case of *Pullen v. Snelus*, 40 L. T. N. S. 363, is very much in point.

In that case Lindley, J., says, at p. 364: "What ought to appear somewhere on the pleadings are those facts which, according to the defendant, make the Statute of Frauds applicable. He must make those facts appear, and then go on to shew that he intends to rely on the Statute of Frauds."

Applying this rule, the statement of defence here possibly makes facts appear which make the statute applicable, but does not go on to shew that the defendant intended to rely on the statute. I think the statement of defence does not entitle the defendant to take the benefit of R. S. O. ch. 73.

As to want of notice. It is clearly not set up. The old form of plea is set out in *Bullen & Leake's* Precedents of Pleading, and is specific.

Unless, therefore, the evidence is such as entitles the defendant to have the case sent down for a new trial, or to amend his pleadings to support the finding of the jury, the nonsuit must be set aside, and judgment be entered for the plaintiff on the general finding for him, entitling him to \$200 damages.

This is so because the special finding is not material, for, as we have said, honest belief constitutes no defence, except to a public officer who avails himself by plea of this statutory protection, unless there be reasonable grounds for such belief.

The learned Judge at the trial thought there was no

evidence fit to be submitted to the jury to support the finding, and had he been made aware of the decision in *Verratt v. McAulay*, as to notice of action, which was unreported at the time of the trial, he would have disregarded the finding, and entered judgment for the plaintiff.

I have conferred with the learned Judge as to the damages, and he is quite of the opinion that they are none too large. He formed the most unfavourable opinion of the defendant's conduct, as is evidenced by his charge and his judgment. The jury seemed to have shared such opinion, as appears from their verdict, and it is not at all impossible, as was pointed out by the learned Chief Justice of this Division on the argument, that they thought the question left to them referred to the duty of the defendant to make the arrest of the thief, in view of the fact that the complaint of the plaintiff was the neglect of duty of the defendant in permitting the thief to escape.

I am strongly convinced this is so, and in this view the findings are quite consistent, and the findings warranted a judgment for the plaintiff in any view of the law as to the pleadings.

Unless the evidence very strongly preponderates in the defendant's favour, I would much hesitate in opening his way to raise the defence of want of notice, as the plaintiff could not now remedy the defect, although he could have done so had the plea been put in in due course.

The evidence is very brief. It appears that the plaintiff, a commercial traveller stopping at the Russell House, St. Catharines, wakened up about six o'clock on the morning of the 8th of August, 1883, and found that during the night his watch and about \$50 in money had been stolen. Thinking the thief was in the house with the articles, the defendant was sent for. A policeman named Lane came first, and he went for the defendant. They arrived about 6:30 o'clock, and then what follows appears in the evidence of the plaintiff, Lane, and the defendant. The plaintiff said: "The first thing he (defendant) said to me was, 'Well, what is all this racket so early in the morning?'

I said, 'I have lost my gold watch and chain.' This was on the street, about thirty feet from the corner. I said I had lost a gold watch and chain, and about \$40 in money. Q. Who took it? A. I don't know. Q. Well, what do you want? A. I would like to have the house searched. 'I will search no house that size,' says he. Says I, 'I have seen a house that size searched before, and the property found.'" Then, after some conversation about the necessity for a search warrant, during which the plaintiff told defendant there was no use waiting for a search warrant, for the party who took the articles would be gone, the chief of the police (defendant) said, "I will search no house that size," and started away. The plaintiff then said, "You have a right to help me, and I know it." Whereupon the defendant said, "'I have a right, have I?'" says he, coming at me. 'I will shew you what right I have,' says he. 'You are nothing but a damn liar and impostor. You never had any money.' He told the policeman to take hold of me. He said, 'You were drunk last night, and not sober,' and between them they waltzed me to the station. The chief took hold of me first. He says to the other policeman, 'Take hold of this man.' He let go of me when we got to the Murray House."

Then follows a description of taking the plaintiff to the station house, taking his name, &c., and the discharge by the defendant after—as it seems to me—he, the defendant, obtained control of his temper. The defendant then accompanied the plaintiff to the hotel, arriving there about 7.30 o'clock, but in the meantime the porter—the supposed thief—had flown with the stolen articles.

Lane substantially corroborates the plaintiff, and also states that the plaintiff told the defendant he did not need a warrant to search the house, as the landlord was willing. The policeman says the plaintiff was excited. He also says the defendant called the plaintiff an impostor, crank, and liar. Lane, on cross-examination, admitted having said something to the effect that he thought the plaintiff had *delirium tremens* at the time.

The plaintiff swore he had never been drunk in his life, and the evening before had only had two glasses of beer.

The witness Haines, standing on the opposite side of the street, heard the defendant in a louder than usual tone of voice order the constable to arrest the plaintiff.

The defendant's statement does not vary a great deal, except that he denies using the words charged by the plaintiff, and states that the plaintiff, in reply to a statement of the defendant that he would watch the house while the plaintiff went for a search warrant, said he would see him (defendant) damned first, and the defendant said to the plaintiff that he was imposing on him. He adds: "I was then under the impression the man was labouring under *delirium tremens*, or he was insane, and I ordered Lane to take hold of him, and we brought him to the American Hotel, and I saw the man was sensible and I let go of him at once, and went on before him. At the office I gave him a chair to sit on, and he gave me a statement of the particulars." He also stated that the plaintiff would not tell him the names of the persons he suspected, and kept turning on his heel, keeping his face away from him.

It will be observed that, notwithstanding that he discovered that the plaintiff was sensible shortly after the arrest, he took him to the station in custody of the policeman. In order therefore to find some justification for his conduct, he further stated, in answer to the following question, "What was there in the way in which he acted that would justify you in arresting him? A. I looked upon it that he had violated the by-law in cursing on the street. He said he would see me damned first, and that was his way all through."

On cross-examination he said he arrested the plaintiff for violating the by-law on the street.

It seems to me that the defence as to arresting the plaintiff for cursing on the street was an after-thought, for surely a chief of police would not be so shocked at the use of the single objectionable word but once, as to feel it

necessary to arrest the offender, if there had not been some other cause. Can there be said to be on this evidence any reasonable ground for his believing that his duty was to arrest the plaintiff?

It seems to me there was ample evidence to justify the finding that "the defendant honestly believed that his duty as a constable called upon him to make the arrest" of the supposed thief.

In my opinion there was no reasonable ground for belief by the defendant that he was doing his official duty, and I do not think the defendant is entitled, on the evidence, to have the case sent down for a new trial, or to amend his pleadings to support the judgment.

In my opinion the judgment of nonsuit should be set aside, and a judgment entered for the plaintiff for \$200 damages, and full costs of suit.

CAMERON, C. J., and GALT, J., concurred.

Order absolute.

[COMMON PLEAS DIVISION.]

REGINA EX REL STEWART V. STANDISH.

Public schools—Trustee—Contract—Vacating seat.

Where a school trustee, who was a medical practitioner, acted in his professional capacity under engagement by the board for examining the pupils attending the school as to the prevalence of an infectious disease, and made a charge of \$15 therefor, which the board ordered to be paid, but he afterwards declined to accept payment.

Held, that this disqualified him as trustee, and rendered his seat vacant, under 44 Vic. ch. 30, sec. 13, O.

THIS was a motion for an order absolute for leave to exhibit an information in the name of the Master of the Crown Office on behalf of the Queen, in the nature of a *quo warranto* against the above defendant, to test his right to retain his office of trustee and member of the Public School Board of the Town of Palmerston.

During Easter Sittings, May 31, 1884, *Alister M. Clark* supported the motion. The affidavits clearly shew that there was a contract or expected benefit. Even if it could be argued that at the time the services were performed there was nothing to shew that they were not to be performed gratuitously, the defendant, by subsequently sending in his bill, clearly shewed that this was not his intention, and the council directed the bill to be paid. The case is clearly within the statute, and the defendant's seat is avoided: *Lee v. Public School Board of Toronto*, 32 C. P. 78; *Foster v. Stokes*, 2 O. R. 590. The plaintiff afterwards refused to accept the money, but this cannot affect the disqualification which had already arisen.

Caswell, contra. The defendant's affidavits shew that he never intended to make any charge, and he has expressly repudiated any claim for remuneration, and at the time this application was made he had no claim against the corporation. The defendant does not therefore come within the provisions of the statute. The applicant, by the course he pursued at the council board, acqui-

esced in the act of the defendant, and is therefore estopped from making the application. The issuing of a *quo warranto* in such a case is a matter of discretion, and the Court should not interfere in a case like this : *Rex v. Stacey*, 1 T. R. 1 ; *Rex v. Dawes*, 4 Burr. 2120 ; *Rex v. Sargent*, 5 T. R. 466 ; *Tancred on Quo Warranto*, p. 140.

June 26, 1884.—ROSE, J.—Mr. Caswell objected that the relator had debarred himself from making the application by acquiescence, citing *Rex v. Stacey*, 1 T. R. 1 ; *Rex v. Sargent*, 5 T. R. 466 ; *Rex v. Dawes*, 4 Burr. 278. I have also referred to *The King v. Benney*, 1 B. & Ad. 684 ; *The Queen v. Lofthouse*, 1 Q. B. 440-1. The writ no doubt is in the discretion of the Court, and if the relator has so acted, as, in the opinion of the Court, to disentitle him to have it granted, the Court will refuse it. It will be necessary to see what the relator has here done.

The complaint is, that the defendant, a medical practitioner, was engaged professionally by the Board to examine the pupils attending the school as to the prevalence of an infectious disease: that he did as instructed, and rendered an account for \$15, which the Board ordered to be paid. The relator, a brother physician, was also a member of the Board, and voted for the payment of the account.

It does not appear that he knew of the employment, or in any way gave any official consent thereto. The affidavits shew that after the services were performed, a resolution directing payment was introduced in blank as to amount, and he was requested to fill in the amount; this he refused to do, on the ground that he would not fix the fee for another: that then Dr. Standish produced a prepared account from his pocket, for \$15, and that sum was filled in and the resolution submitted to the Board, and passed without opposition. It also appears that when Dr. Stewart was requested to fill in the blank he expressed a doubt as to Dr. Standish being entitled to any fee for his services.

This occurred on the third of March, 1884, and from

that time I think the relator has been persistent in his efforts to have the defendant removed from office. Unless then I can say that the not formally voting against the motion to pay the account after it was handed in to the Board, was such an act as should disqualify him from acting as relator, this objection fails. No case has been cited, nor have I found any going so far, and I think, for reasons which will hereafter appear, that the objection should not be allowed to prevail.

Then has the defendant's seat become vacant within the meaning of sec. 13, of 44 Vic. ch. 30, O. ?

That section provides that "No public or high school trustee shall enter into any contract, agreement, engagement, or promise of any kind, either in his own name, or in the name of another, and either alone or jointly with another, or in which he has any pecuniary interest profit, or promised or expected benefit, with the corporation of which he is a member, or have any pecuniary claim upon, or receive compensation from such corporation for any work, engagement, employment, or duty on behalf of such corporation, and every such contract, agreement, engagement or promise, shall be null and void, and such trustee shall also *ipso facto* vacate his seat, and a majority of the other trustees may declare the same accordingly."

As to the force, or want of force, of the last clause of the section, see remarks of Osler, J., in *Lee v. Public School Board of Toronto*, 32 C. P. 78.

Now in this case, Dr. Standish, a physician, receives instructions to perform professional services. He does perform them, sends in to the Board an account for such services, and is present while the Board by resolution directs payment, and this after warning by Dr. Stewart expressing doubt as to his right to receive payment.

In his affidavit he states clause 16, "that in putting in said account I did so believing that I was doing so legally, and ignorant of violating any provision of the school law."

It seems to me beyond argument that this was an agreement or engagement in his own name, in which he had a "pecuniary interest, profit, or expected benefit."

On the 4th of March he wrote to the Minister of Education. A copy of the letter is not put in, but the affidavit states that in it he asked "if this appointment and payment under the circumstances would be a violation of the law," shewing that at that date he had not made up his mind to refuse payment. He received a letter of reply dated 11th of March, sending him a copy of the Act, and informing him that the law would not allow his receiving a fee.

On the 7th of April a motion was offered, declaring the seat vacant, but owing to the fact that the Board consisted of six members, two of whom, *i. e.*, the Chairman and one Caswell, appeared to be friendly to the defendant, and three, *i. e.*, Hyndman, Beattie, and the relator, unfriendly, the motion was not declared carried, as the Board was thus equally divided on the vote.

On the 9th of April, the defendant sent a letter to the Board, renouncing all claim to the \$15, and asking to have the resolution directing payment rescinded, adding, "I present the services rendered to the Board as a gratuitous service. Through ignorance of the law I presented an account, but I have not accepted payment, and I refuse to do so."

The defendant still claimed to act as a trustee, and attended subsequent meetings of the Board. He also endeavoured to have the resolution rescinded, but owing to the opposition of Hyndman, Beattie, and Stewart, has failed. It would seem in the interest of the public that some change should take place in the constitution of the Board, and although it may seem hard that the defendant should be sacrificed to an unwitting violation of (to him) an unknown law, yet the public will not suffer if the present apparent deadlock be removed.

In my opinion he has, in the language of the statute, "*ipso facto* vacated his seat," and the rule should be made absolute.

It is unfortunate that a brother physician should have acted as the relator. It lays him open to the suggestion

made on behalf of the defendant that his motives are not the conserving of public interests. That he is supported in his cause by Hyndman, who as Chairman of the Managing Committee employed the defendant to perform the service, does not give strength to the application. Had Hyndman been the relator I think I would have been able to have given effect to Mr. Caswell's objection. While on the present material the order *nisi* must be made absolute, it is not a case for costs down to and including the taking out of the order absolute.

If the defendant will within ten days place a letter or document in the hands of the relator's solicitor, and of the solicitor to the Board, admitting that he has forfeited his seat, and consenting to the Board declaring it vacant, the motion may be dismissed, without costs. Of course the giving of such letter will not be any objection to his running again, if otherwise qualified.

Immediately on receipt of such letter the Board should declare the seat vacant, and a new election be held according to law.

If such letter be not given within the ten days, then order absolute without costs, as above.

CAMERON, C. J., and GALT, J., concurred.

Judgment accordingly.

[QUEEN'S BENCH DIVISION]

FREEMAN V. ONTARIO AND QUEBEC RAILWAY COMPANY.

Award—Arbitrators—42 Vic. ch. 9, D.

On an arbitration with regard to land taken by a railway company, the argument closed on the 10th of August, and the arbitrators adjourned until the 11th, when, after discussion, one of them said he was sorry he could not concur with the others in the sum which they had agreed upon, and withdrew. The other two then signed the award in presence of each other, and reacknowledged it in presence of a witness on the 14th of August.

Held, that the meeting having been adjourned to the 11th the case was within the terms of 42 Vic. ch. 9, sec. 9, sub-sec. 17, D.

Held, also, after reviewing the authorities, that the award was valid at common law.

THIS was a motion for an order directing payment out of Court of moneys deposited in Court as compensation to the plaintiff for the appropriation of her land under the Consolidated Railway Act, 1879.

C. H. Ritchie, for the motion.

H. Cameron, Q. C., contra.

June 28, 1884. ROSE, J.—The company oppose the motion on the ground that the award is invalid, having been signed by two of the arbitrators without notice to the third, citing *Norval v. The Canada Southern R. W. Co.*, 9 A. R. 310, and in the Supreme Court, not yet reported.

No point was taken as to the right to urge this objection on a motion to set aside the award, or after the motion to set aside had failed, and on which motion such point was not taken. I therefore consider the objection as open to the company, expressing no opinion on the point.

The evidence on the motion before me consists of affidavits of two of the arbitrators, Mr. Bull and Mr. Kingsmill, the examination of Mr. Read before the Master, and the cross-examination before myself in Chambers of Mr. Bull on his affidavits.

I think the following facts clearly appear :

That the argument closed on the 10th August, and the arbitrators adjourned until the morning of the 11th, when they then had some discussion, including the question as to the amount of their fees : that Mr. Kingsmill, who was the arbitrator appointed by the railway company, having kept the most accurate memoranda, supplied Mr. Read with the information necessary to enable him to make up the amount of fees to which they were entitled, and which Mr. Read subsequently obtained, paying over to each of the others his share : that not having time to finish the discussion as to the amount of the award, an adjournment was agreed upon to Mr. Read's office that afternoon, the day being Saturday, and Mr. Kingsmill being desirous of returning from Toronto to his home in Walkerton : that it was known that Mr. Bull was about to leave for his summer vacation, and all parties were anxious to close the arbitration : that Mr. Read, according to previous agreement that he should prepare the award when the proper time arrived, had drafted the award prepared before the meeting at his office—I do not think that the fact of its being prepared was communicated to Mr. Kingsmill before he left : that the discussion as to the amount of the award took some time, possibly an hour, or it may be two hours. Mr. Read had previously gone into calculations which, with the evidence, led him to the conclusion that \$1,700 was the proper amount. Mr. Bull thought a much larger sum ought to be awarded. Mr. Kingsmill contended for a much smaller sum. Mr. Kingsmill no doubt expressed dissatisfaction with Mr. Read having come to a conclusion before further discussion, and when, to quote from Mr. Kingsmill's affidavit, " After some discussion Mr. Bull said that he would concur in Mr. Read's figures, and would sign an award with him for the amount he named. * * Mr. Read made a memorandum of the amount on the back of his notes of evidence and asked me to concur in said amount, and I declined so to do ; he put his signature to said memorandum, and I believe Mr. Bull did so as well."

Mr. Kingsmill then said he was sorry he could not agree, shook hands with Mr. Read and Mr. Bull, and left, saying he had not much time, he was going to the train. Mr. Read then said to Mr. Bull that as Mr. Kingsmill could not agree with them they might as well sign the award. The necessary verbal alterations were made in the award to make the document complete, except the date, and both Mr. Bull and Mr. Read signed the award. There was no witness present. It was reacknowledged in presence of a witness on the 14th, when I judge the date was filled in.

Mr. Bull, in his evidence, said Mr. Kingsmill's closing words were: "I am sorry I cannot agree with you." He said he would not sign an award for \$1,700.

The award, apart from the formal recitals as to notice of intention to expropriate, appointment of arbitrators, and examination of witnesses, is in these words:

"Now know ye, that we, the undersigned majority of the said arbitrators, adjudge and determine that the said Helen Freeman is entitled to receive for such compensation for her land so taken by the said railway company, and as compensation for the damages sustained by her by reason of the exercise of the powers referred to in the said notice, the sum of \$1,700, which sum we adjudge, award, and determine the said railway company shall pay the said Helen Freeman for such compensation and damage aforesaid forthwith." The award is dated 14th August, 1883.

It will thus be observed that the question for discussion and determination was the amount to be awarded. The fair result of the evidence is, I think, that if an agreement had been arrived at, the award was to be made that afternoon.

The award was taken up in due course, and the arbitrators' fees paid.

The company subsequently unsuccessfully moved against the award on the ground that the amount was excessive, and on other grounds, not however raising the present objection.

Mr. Cameron strongly relied upon the case of *Norval*

v. *The Canada Southern R. W. Co.*, 9 A. R. 310, where the Court of Appeal held the award signed by two out of three arbitrators without notice to the third invalid, because the requirements of the Railway Act had not been complied with, although the dissentient arbitrator, the same Mr. Kingsmill, formally and in writing notified his brother arbitrators as follows:

"I do not intend to sign the award for the amount you gentlemen have determined upon, and therefore will not attend any meeting called for the purpose of executing the same, and waive all notice or notices that might be necessary for the purpose of such execution."

The words of the statute 42 Vic. ch. 9, sec. 9 sub-sec. 17, D. are:

"No such award shall be made, or any official act done by such majority except at a meeting held at a time and place of which the other arbitrator has had at least two clear days notice, or to which some meeting at which the third arbitrator was present, had been adjourned."

It was held that the statute forbids, in the positive enactment above quoted, the making of an award, &c., except at a meeting held as above directed. See also *Anglin v. Nickle*, 30 C. P. 87, per Wilson, C. J. That decision, however, does not assist us here, for the award in this case was made "at a meeting held at a time and place to which a meeting at which the third arbitrator was present had been adjourned," and therefore unless assailable at common law can be upheld.

Nott v. Nott, 5 O. R. 283, was cited, but does not apply. It only decided that the award must be signed by all the arbitrators, or the majority, at one time in the presence of each other, but does not discuss or determine the question as to when the majority can execute in the absence of the dissentient. Hagarty, C. J., in his exhaustive judgment of first instance, says, *en passant*, at p. 291: "If the third named had finally dissented, and required no further notice, and they awarded in his absence, it would be sufficient." Wilson, C. J., in giving judgment in the

Divisional Court, states, at p. 294, the result of the decisions to be, "that all the arbitrators should concur, or have an opportunity of concurring."

In *Norval v. The Canada Southern R. W. Co.*, 9 A. R. 310, the learned Judge, in giving judgment, at p. 319, doubts as to whether at common law it would be possible to sustain an award of the majority if made without notice to the dissentient, when he had previously stated he would not attend any meeting to sign the award. He refers to *Mordue v. Palmer*, L. R. 6 Chy. 22, and *In re the Arbitration between The Corporation of the City of Toronto and John Leak*, 23 U. C. R. 223, but expressly adds, "I do not enter upon a discussion of the decisions." We are therefore compelled to examine the cases.

In *Anglin v. Nickle*, 30 C. P. 87, Wilson, C. J., expresses a somewhat similar doubt, citing *Wade v. Dowling*, 4 E. & B. 44. This opinion is also a dictum, and does not relieve us from further examination of the authorities. In both these cases of *Norval v. The Canada Southern R. W. Co.*, 9 A. R. 310, and *Anglin v. Nickle*, the opinion seems to be that possibly at common law, and certainly under the Railway Act, the dissentient arbitrator cannot, by pre-announcement of his determination not to join in the award, deprive the parties of the right to have him notified, so that when they finally meet his views may be pressed upon his co-arbitrators and possibly affect the decision. Neither case, however, goes the length of saying that when at a meeting of the arbitrators, all being present, and each having arrived at a decision, two agreeing and the third dissenting, and the third thereupon withdraws, the majority are unable to sign an award, but must formally adjourn and give the dissentient who has voluntarily withdrawn notice of a meeting for the purpose of signing the award. We will examine the cases to see if any decision has gone that length.

Mordue v. Palmer, L. R. 6 Ch. 22, does not decide this point. It was a case of a single arbitrator, and chiefly discusses when he is *functus officio*, power over costs, and correction of clerical error.

In re City of Toronto and Leak, 23 U. C. R. 223, the dissentient arbitrator stated that he could not sign the award, and that they might "count him out." The majority subsequently received and considered a letter without shewing it to the dissentient, but did not alter their determination. Held, award invalid, Draper, C. J., dissenting, on the ground that the three "had discussed all the matters on which they were or believed themselves to be called on to award, and that each was aware of the judgment formed by the others on the several points, and that when Manning parted from the other two the disagreement between him and them was fully and finally understood."

The award was held invalid by Hagarty, J., mainly on the ground of the impropriety of refusing to consider a request made in the letter that the amount found on the different heads of the claim might appear on the face of the award so as to enable the parties to take the opinion of the Court thereon. This he held should have been submitted by the majority to the third, and considered.

Wade v. Lowling, 4 E. & B. 44, decided that where two out of three sign at different times and places, the award is invalid.

In re McDonald and Presant, 16 U. C. R. 84, where after the third arbitrator had declared his dissent, the majority further considered and sent him notice of an intention to again meet, the award was held invalid, because of the insufficiency of the notice, as they shewed that they *had not treated his declaration that he would not agree as final*, citing *Pering v. Keymor*, 3 A. & E. 245. In *Pering v. Keymor*, Lord Denman, C. J., says, at p. 246: "If, after discussion, it appears that there is no chance of agreement with one of the arbitrators, the others may indeed proceed without him." Per Coleridge, J.: "One of them refused his assent. I do not say that this might not have authorized the others to proceed without him."

In re Young and Bulman, 13 C. B. 623, where no formal notice was shewn, Jervis, C. J., said, at p. 627: "We cannot infer that Hayton did not know of the time and place of

the intended meeting. And if he did not choose to attend, the other two had a perfect right to make the award without him."

In *Goodman v. Sayers*, 2 J. & W. 249, the third was not cited when the award was made. The Master of the Rolls refused to set aside the award, stating his reasons, at p. 261, as follows: "Here, however, all the evidence was heard, and all the substance of the business was settled in his presence; this they thought they were at liberty to do by themselves; the rest, the signing the award, was a mere form; they did not however act secretly, but determined in the manner in which they had previously informed him that they should. Then, should the Court set aside the award, on account of the absence of one arbitrator under these circumstances? The cases have never gone that length." This case no doubt goes to a greater length than the more modern decisions.

Jekyll v. Wade, 8 Gr. 364, may be referred to. There Esten, V. C., said: "If, after a thorough discussion of the matter, arbitrators cannot agree, and one definitively withdraws, the others may dispose of the matters in dispute."

In *re Anderson v. Cotton*, 2 P. R. 109, and *Martin v. Kergan*, 2 P. R. 370, differ as to the facts from this case. So also does *Re Hubbard v. The Union Fire Ins. Co.* 44 U. C. R. 391.

In *re Templeman and Reed*, 9 Dowl. 962, Coleridge, J., states the law thus: "The principle on which this case must be decided is quite clear. The parties are desirous of having their dispute settled by a unanimous award of three, and no award of two can be good until the third has had a full opportunity of joining in it, and has declared his dissent from it, or withdrawal from the reference."

On p. 966, he says: "Courts of law will always construe awards, and hear motions respecting them, with a desire to sustain the judgment of the tribunal which the parties have selected."

I think, acting upon such rule, and no case having been found going the length I am asked to go; and believing

that Mr. Kingsmill had full opportunity of joining in the award, and did declare his dissent from it, and withdrew from the reference; remembering that he received his fees without protest against the action of his brother arbitrators; that the company made a motion against the award without raising this point, although a perusal of the facts in the Norval Case could hardly fail to suggest it, I am convinced that the objection is an after thought and should not be received with favour.

I will leave it to a higher Court to lay down a rule of law (if one is to be laid down on facts such as these,) which will deprive this claimant of her award. I cannot assume the responsibility.

The order will be made absolute, with costs.

[COMMON PLEAS DIVISION.]

WHEELER AND WILSON MANUFACTURING COMPANY V.
JAMES WILSON.*Company—Stock, cancellation of—Fraud—Laches.*

The defendant, an original stockholder in a joint stock company, his stock being fully paid up, was elected a director, after a statement prepared by the company's secretary had been published by them, setting forth that the company was in a flourishing condition earning a ten per cent. dividend. On the faith of such statement defendant subscribed for new shares in the company, but soon afterwards suspecting that the statement was incorrect, he threatened legal proceedings to compel them to cancel the stock, whereupon a resolution was passed directing the books to be examined, and on such examination the statement was found to be false, and the company practically insolvent. A meeting of the shareholders was then called, and a by-law passed cancelling the stock. After the defendant's subscription for the new stock, and before the cancellation, as also before the defendant became aware of the falsity of the statement, the plaintiff became a creditor of the company. The plaintiff after such cancellation, issued a writ and obtained a judgment against the company, and then sued defendant for the amount of the new stock unpaid by him.

Held, that the plaintiff could not recover : that there was power to cancel the stock : that the cancellation was duly made ; and that the defendant was not guilty of any laches.

THE statement of claim charged that the plaintiff recovered judgment against the Ingersoll Shirt Manufacturing Company on the 21st of April, 1883, setting out the issue of an execution against goods and a return of *nulla bona* : that the company was a joint stock company duly incorporated pursuant to the provisions of "The Ontario Joint Stock Company Letters Patent Act," with a capital stock of 400 shares of \$50 each, of which 100 shares were issued, and subscribed for, and paid up : that the defendant was duly elected a director of the company : that in December, 1882, there was a further issue of shares, all original shares being fully paid up, and the defendant subscribed for 30 of said shares, representing \$1,500, paid nothing thereon, and being a director of the company, in collusion with the other directors, on 16th February, assumed fraudulently to cancel said subscriptions for the purpose of relieving himself from liability therefor, and to defraud the plaintiff and others.

It prayed that such cancellation be declared fraudulent and void, and the defendant be declared liable as holder of these shares, and ordered to pay the amount of the plaintiff's judgment, \$242 debt, and \$24 costs.

The defendant denied the subscription; and stated that he was induced to take the new stock by reason of a false statement put forth by the company, declaring that they had earned a dividend of 10 per cent for the year ending 10th October, 1882: that this was false and fraudulent, and on the faith of it he took the stock: that having ascertained this he threatened legal proceedings, and on the 10th of February wrote to that effect to the company, and the latter cancelled the subscription as they would have been compelled to do by law. He denied all fraud in such cancellation and alleged that the plaintiff had no *locus standi* in this Court in this action, craving the same remedy as if the claim had been demurred to.

Joinder.

The cause was tried before Hagarty, C. J., without a jury, at Toronto, at the Spring Assizes of 1884, who delivered the following judgment:

HAGARTY, C. J.—I find the facts as follows:

The defendant was an original stockholder in the company, and was elected a director on his original stock, which was fully paid up.

Before he was such director a statement was published by the company, prepared by their secretary, shewing them to be in a flourishing condition, and earning a 10 per cent dividend.

On the faith of this statement being correct the defendant, on the 28th December, 1882, subscribed with three or four others, for more stock, 30 shares. Nothing was paid on them. Soon afterwards defendant suspected that the statement published was incorrect, and threatened legal proceedings to compel the Company to cancel his new subscription.

Under a resolution of 15th January, the books were examined, and it was found that the published statement was wholly incorrect, and the company practically insolvent.

On the 30th January a meeting of the shareholders was called.

On the 10th February the shareholders met, all but two were present, and it was agreed to cancel the new subscription; an adjourned meeting was held on the 12th February, and on the 16th February a by-law was duly passed cancelling the new subscription.

I find that this was done under threat of legal proceedings: that it was done in good faith without any fraud or collusion; and that the statement on the faith of which the defendant subscribed was false and misleading.

No attempt was made at the trial to uphold the statement, though the person who prepared it was examined on another point by the plaintiffs.

In my opinion the defendant had a sufficient case to have compelled the company to relieve him from this new subscription, and that the company properly yielded to his demand, and that the new subscription was properly and legally cancelled.

The order for these goods supplied by the plaintiff to the company was given early in January.

It was for an ordinary purchase under \$250.

I think the present defendant was aware of the order being given, but I also think it was before he was aware of the falsehood of the representations on which he took the new stock.

The writ against the company for the goods was not issued till the 11th April.

The company became insolvent in March.

I cannot see how his knowledge of such order can affect his right to have claimed relief from his new subscription.

Nor can I accede to Mr. Allan Cassels's argument, that the company cannot cancel a subscription of stock under any circumstances.

I think the company had the power to cancel when they found here the parties had by representations, binding on them, been deceived or entrapped into taking stock. I do not think they were bound to wait for the judgment of a Court compelling them to do right.

I think the claim must be dismissed, with costs.

During Easter sittings, *Allan Cassels* moved on notice; set aside the judgment entered for the defendant, and to enter judgment for the plaintiffs.

During the same sittings, June 2, 1884, *Allan Cassels* supported the motion. The directors had no power to cancel the stock. The power must be expressly given by statute, and the Act contains no such power: *Brice* on *Ultra Vires*, 2nd ed., pp. 383-4; *Marshall v. Glamorgan Iron and Coal Co.*, L. R. 7 Eq. 129; *Buckley* on the Companies Acts, 4th ed., pp. 73-4; *Dixon's Case*, L. R. 5 Ch. 79, at pp. 84-85; *Wright's Case*, 7 Ch. 55, at p. 58; *Fletcher's Case*, 37 L. J. N. S. Ch. 49. The contract is not void but merely voidable, and therefore, no matter how inequitable it may be, the defendant is liable until he has taken steps to avoid it. Even if the company had power to cancel the stock it would not avoid the subscription *ab initio*, but only from the time of cancellation. There can be no cancellation as against intervening creditors, and here the creditors intervened before the cancellation took place. The defendant was clearly guilty of laches in not notifying the plaintiffs of his demand on the company to cancel the shares, though aware of the purchase of the goods by the company: *Oakes v. Turquand*, L. R. 2 H. L. 325, 361; *Brice* on *Ultra Vires*, 2nd ed., 468; *Buckley* on the Companies Acts, 4th ed., pp. 105-6; *Lindley* on Partnership, 4th ed., pp. 528-9, 533; *Stone v. City and County Bank*, 3 C. P. D. 282, 308, 309; *Henderson v. Royal British Bank*, 7 E. & B. 363; *Bath's Case*, 8 Ch. D. 334; *Re Reese River Mining Co.*, *Smith's Case*, L. R. 2 Ch. 604, 616, L. R. 4 H. L. 76; *Mixer's Case*, 4 De G. & J. 575, at p. 586; *McIntyre v. McCracken*, 1 App. 1, 1 Sup. Ct. R. 479, at p. 499; *Nasmith v. Manning*, 5 Sup. Ct. R. 417, at p. 444; *Lawrence's Case*, L. R. 2 Ch. 412, at p. 425; *Directors, &c., of Central R. W. Co. of Venezuela v. Kish*, L. R. 2 H. L. 99, at p. 125; *Re London and Staffordshire Fire Ins. Co.*, 24 Ch. D. 149, at p. 154; *Petrie v. Guelph Lumber Co.*, 2 O. R. 218; *Bullivant v. Manning*, 41 U. C. R. 53.

J. K. Kerr, Q. C., contra. The company had clearly power to cancel the shares as there was fraud in the transaction. The defendant had the right to avoid the transaction, and the company were not bound to wait until

an order of the Court was obtained compelling them to do what they have done. The act of creditors intervening can make no difference. The fraud rendered the purchase voidable *ab initio*, and the cancellation referred back to such period. The cases referred to by the other side are all cases where an order for winding up had been granted, and the rights of the liquidator had intervened. To entitle the plaintiffs to recover, it was necessary that they should have been judgment creditors when the cancellation took place. He referred to *Wright's Case*, L. R. 7 Ch. 55; *Re Scottish Petroleum Co.*, 23 Ch. D. 413; *Redgrave v. Hurd*, 20 Ch. 1; *Brice on Ultra Vires*, 2nd ed., 468.

June 26, 1884. ROSE, J.—This is a motion to set aside the judgment entered for the defendant by the learned Chief Justice, now of Ontario, then presiding in the Queen's Bench Division, and to enter judgment for the plaintiffs.

The facts and findings appear in the judgment moved against.

The points pressed upon us by Mr. Cassels were:—

1. That the directors had not power to cancel the stock, as there was no direct power given by the statute.
2. That the rights of plaintiffs as creditors intervened between the time of subscription and avoidance, and as the contract was only voidable and not void, the power to avoid, while possibly good as against the company, could not be exercised against the plaintiffs.
3. That defendant was guilty of laches in not notifying the plaintiffs of his demand on the company to cancel the shares, he being aware of the purchase in the meantime by the company of the goods in question.

Mr. Kerr, on the other hand, denied the right of the plaintiffs to interfere, they not being execution creditors who had sued the defendant at the time of the cancellation.

Many cases were cited. Indeed, Mr. Cassels, with his usual industry, has not, I think, overlooked any leading case.

No authority has been cited, nor do I think can any be

found to support the proposition, that where a company has obtained a contract to take shares by such fraud as entitles the subscriber to avoid the contract, the company has no power to cancel the shares at the demand of the subscriber.

Mr. Brice, in his work on *Ultra Vires*, 2nd ed., p. 383, under the rule that "A power to cancel must be given expressly, either by statute, or at the inception of a corporation," states, "What is meant by this power, is the capacity after shares are allotted and accepted, *when no dispute exists as to the liability of the shareholder*, to cancel such shares, and determine the liability thereon." He adds: "This must not be confused with the closely allied proceedings—(1) compromise of disputes, and (2) rescission of what has been wrongly done by inadvertence. These two are proceedings which every corporation may engage in without express authority."

It surely must be so in the nature of things. If the contract is voidable at the election of the subscriber, it becomes void when he so elects, and it indeed would be anomalous if the directors had not the power to cancel the shares which the subscribers had the power to hand back, and as to which all liability ceased to exist.

I am of opinion that the company had power in this case to cancel the shares.

No authority has been cited which shews that when a subscriber has a right to avoid and does avoid *before liquidation proceedings have been instituted* he may not do so.

Oakes v. Turquand, L. R. 2 H. L. 325, is authority for the proposition that it was too late to do so *after* the order for winding up.

Wright's Case, L. R. 7 Ch. 55, is authority in favor of such right before the order for winding up.

See also *Burgess's Case*, 15 Ch. D. p. 511, where the company was never properly a going concern; *In re Scottish Petroleum Co.*, 23 Ch. D. p. 430, *et seq.*, where the cases are collected, especially the case of *Re Reese River Silver Mining Co.*, *Smith's Case*, L. R. 4 H. L. 64, where the

bill was filed before the petition to wind up, and a decree was made granting relief after the order for winding up had been made.

The principle seems to be that after the order for winding up the company ceases to exist, and the liquidator's rights are perfected.

To give effect to Mr. Cassels's argument, as he candidly admitted, would be to hold that in every case of a contract to take shares induced by fraud, the subscriber would remain liable for all the debts incurred between the date of subscription and cancellation. I think this ground also fails.

On the facts of this case I do not see how it can be contended the defendant was guilty of laches. They are widely different from those in *Re London and Staffordshire Fire Ins. Co.* 24 Ch. D. 149, at p. 154, and unless we are prepared to hold that a shareholder, immediately upon electing to avoid a fraudulent contract, is bound to notify all creditors, or the whole world, who might become creditors, I do not think we could hold the defendant here guilty of laches.

It becomes unnecessary to consider the status of the plaintiff, as to whether he has any rights higher than the company, and whether, not being an execution creditor who had taken proceedings against the shareholders at the time of cancellation, he could be heard to complain, although the latter question is in some measure considered and disposed of in the determination as to the second proposition. On these points *McIntyre v. McCracken*, 1 Sup. Ct. R. 479, may be referred to, also *Field v. Galloway*, in which judgment was given in this Division, March 7th, 1884 (a).

I am of the opinion that the motion must be dismissed, with costs.

CAMERON, C. J., and GALT, J., concurred.

Motion dismissed.

[COMMON PLEAS DIVISION.]

McKERSIE V. McLEAN.

Seduction—Service—Right to maintain action.

In an action for seduction of the grand-niece of the plaintiff, it appeared that on her father's and mother's death, when she was about twelve years old, she went to live with the plaintiff, and from thence went out to service to various persons, and at the time of the seduction, and for three years previously, was in the service of one C. retaining her wages for her own use. She was seduced by the defendant in the month of April, being then about nineteen years old. In June following she went to Detroit for a couple of weeks, and from thence to the plaintiff's, where she resided until she was sick, when she went to the hospital, where she was confined. While at the plaintiff's she worked, and did whatever was required of her, the plaintiff treating her as if she were at home; as her guardian.

Held, that the plaintiff could not recover, for that the right of action for the alleged wrong was not vested in the plaintiff, but in the person who was master of the girl at the time of her seduction.

THE plaintiff, was the grand uncle of one Janet Pickham, a spinster, and brought this action for the alleged seduction of the said Janet Pickham by the defendant.

In the plaintiff's statement of claim he set forth the wrong he complained of as follows: The defendant debauched and carnally knew one Janet Pickham, niece and servant of the plaintiff, whereby she became pregnant, and was sick, and the plaintiff thereby for a long time lost and was deprived of the services of the said Janet Pickham. The plaintiff also incurred expense in and about the nursing and taking care of the said Janet Pickham.

The defendant in his statement of defence denied that he debauched the said Janet Pickham, and that she was the niece and servant of the plaintiff.

The cause was tried before Wilson, C. J., and a jury, at Woodstock, at the Spring Assizes of 1884.

It appeared by the evidence that Janet Pickham was the grand-niece of the plaintiff: that she was about nineteen years old at the time of trial: that her father and mother died when she was young: that upon her father's death when she was about twelve years old, she went to live with

the plaintiff: that after going to the plaintiff's she went out to service to various people, and at the time of her alleged seduction she was in the service and employment of one John Cranston, a brother-in-law of the defendant. She went to live there when she was sixteen, and remained there for about three years.

The seduction took place at Cranston's house, and she admitted that about a month before the alleged seduction she had connection with one Alexander Amos. The wages she received from Cranston she used for her own purposes. After leaving Cranston's, which was in the month of June, the seduction having taken place in April, she went to Detroit for a couple of weeks, and then went to the plaintiff's, where she remained till she was sick, which was in January. She went to be confined at the hospital in Guelph, and was confined there. While she was at the plaintiff's she worked and did what was required of her, and the plaintiff treated her as if she was at home as her guardian.

At the close of the plaintiff's case, *Beard*, Q. C., counsel for the defendant, submitted that there was no case made out on the issue that the girl was the servant of the plaintiff and that the only person who could maintain the action, if, maintainable, was Cranston.

The learned Chief Justice declined to nonsuit, and let the case go to the jury.

The counsel for the defendant called no witnesses, and the jury found that the plaintiff was and is in the relation towards the said Janet Pickham of a parent from a time long before her seduction, and thence hitherto: that the defendant was the father of the child in question; and they assessed the plaintiff's damages at \$700.

During Easter Sittings, May 19, 1884, *J. K. Kerr*, Q. C., obtained an order *nisi* calling on the plaintiff to shew cause why the verdict and judgment should not be set aside, and a nonsuit or judgment for the defendant entered, on the ground that the verdict was contrary to law and evidence: that the plaintiff was not the master of his niece Janet Pick-

ham at the time of her alleged seduction, but at that time, and for some months thereafter, she was the servant of another person, and the plaintiff is not entitled to maintain this action for damages resulting from such alleged seduction; and also why a new trial should not be had on the ground of excessive damages; and on grounds disclosed in the affidavit of the defendant filed.

The defendant by his affidavit denied that he had carnal connection with the said Janet Pickham, and that she became pregnant by him; and alleged that he desired to be called as a witness at the trial on his own behalf, and to deny on oath the statements of the said Janet Pickham; but his counsel relying upon the legal objections to the plaintiff's right to recover upon the evidence given for the plaintiff refused to call him, or allow him to be sworn, or to give evidence at the trial; and that he, the defendant, had several witnesses present at the trial to contradict the various statements and certain portions of the evidence of the said Janet Pickham; but his counsel for the same reason would not call such witnesses, and that he is informed and verily believes he had a good defence to the action upon the merits.

During the same time, May 27, 1884, *J. K. Kerr, Q. C.*, shewed cause. On the evidence the verdict should have been for the defendant. The story told by the girl is a most improbable one. The verdict of the jury can only be accounted for on the ground of the sympathy which juries always shew for the girl seduced. The affidavits filed shew the reason why the defendant was not called as a witness. The plaintiff, however, cannot succeed as a matter of law. The relationship of master and servant did not exist between the plaintiff and the girl seduced at the time of the seduction. The cause of action relates to the act of seduction, and not to the birth of the child, the plaintiff was not the master of the girl until some three months afterwards, and the Court will not extend the operation of the statute: *McKay v. Burley*, 18 U. C. R. 241; *Paterson v. Wilcox*,

20 C. P. 385; *Abernethy v. McPherson*, 26 C. P. 516; *Hicks v. Ross*, 25 U. C. R. 50, 53; *Westacott v. Powell*, 2 E. & A. 525; *Smart v. Hay*, 12 C. P. 528; *McCready v. Grundy*, 39 U. C. R. 316; *Hedges v. Tagg*, L. R. 7 Ex. 283. The damages were clearly excessive.

Ashton Fletcher, contra: The Court cannot interfere on the merits. The question was purely one for the jury, and they found for the plaintiff. The reason given by the defendant in his affidavit filed is no ground for a new trial. The defendant's counsel chose after deliberation, and against the intimation of the learned Judge that the defendant should be called, not to call the defendant, and the plaintiff should not now be made to suffer for what the defendant, now thinks was an error of judgment. There was clearly loss of service proved. It was at the time when the girl was with the plaintiff that the loss occurred, namely, at the time of the sickness, and this gives a cause of action: *Abernethy v. McPherson*, 26 C. P. 516, would shew that the plaintiff is entitled to recover.

June 26, 1884. CAMERON, C. J.—If the defendant is not entitled to succeed on the legal objections urged on his behalf at the trial and renewed by the order *nisi*, it would be a very bad precedent to make to allow him to get the benefit of a new trial to enable him to be examined on his own behalf after the deliberate determination of his counsel to refrain from giving evidence. The responsibility of taking such a course must rest with the counsel, and the client must suffer the consequences should it turn out that the counsel had made an unfortunate mistake. To hold otherwise would open the door to much abuse, and perhaps work grave injustice to a plaintiff, whose case and witnesses would be fully disclosed, and who would thereby be subjected to greater danger of having evidence fabricated against him.

I am of opinion, however, that the plaintiff cannot succeed: that the right of action for the alleged wrong is not vested in him, but in the person who was master of Janet Pickham at the time of her seduction.

The Act respecting seduction R. S. O. ch. 57, does not give any new right of action for the seduction of an unmarried woman to any one except the father or mother of such female, and a person standing in *loco parentis* to an unmarried woman can maintain an action for her seduction only where the father, if living, could have maintained it without the aid of that Act: in other words, only where the relationship of master and servant at the time of the seduction does not exist between such unmarried female and some person other than the father or person standing in *loco parentis*.

The Act has given rise to many nice questions, but in none of the many cases decided under it is the common law right of a master, where the father and mother of the female are dead, to maintain the action, questioned; and I presume, except under the Act, it is not possible for such a wrong a right of action can be vested in two different people not occupying the position of joint masters of the seduced at the same time.

The evidence here discloses that the right of action was, when this action was commenced, vested in John Cranston, and under the defence that Janet Pickham, at the time of her seduction, was not the servant of the plaintiff, the plaintiff's evidence having proved the fact, there was no case to submit to the jury. The rule must be made absolute to set aside the verdict of the jury, and the plaintiff's action be dismissed, with costs.

I have not thought it necessary to refer specially to authority in support of the position that this action is not maintainable where the relationship of father or mother or master does not exist on the part of the plaintiff to the seduced. But the cases cited by Mr. Kerr on the argument fully sustain it, especially *Hedges v. Tagg*, L. R. 7 Ex. 283, and *Thompson v. Ross*, 5 H. & N. 16, in England, and *McKay v. Burley*, 18 U. C. R. 251, in this country, in which Sir John B. Robinson, C. J., at page 252, thus refers to our Act: "The principles of the common law which regulate this action are not interfered with by the Statute 7

Wm. iv. ch. 8" (now R. S. O. ch. 57) "except when the action is brought by the father or mother of the girl. When, as in this case, it is brought, as it may be under certain circumstances, by a person other than a parent, upon the ground that at the time of the seduction the girl was living in his family and was his servant, he must give evidence, as in England, that the alleged relation of master and servant existed at the time of the seduction."

The cases cited by Mr. Fletcher are not opposed in principle to that enunciated by Sir John B. Robinson; *Terry v. Hutchinson*, L. R. 3 Q. B. 599, merely substituting the right to the service at the time of the seduction for actual service, there being no other person having the actual service or the right to it at that time than the plaintiff.

GALT, J., concurred.

ROSE, J., was not present at the argument, and took no part in the judgment.

Order absolute.

[CHANCERY DIVISION]

HAMILTON PROVIDENT AND LOAN SOCIETY V. GILBERT.

*Fraud and misrepresentation—Following moneys fraudulently obtained—
Execution creditors—Removal of cloud on title—Parties.*

G. obtained a loan of \$3,700 through R., from the plaintiffs, upon the security of 220 acres of land, by falsely representing that R. had purchased the 220 acres from W. for \$7,500, and had paid \$4,000 cash, and wanted the loan to pay the balance with, and on the receipt of the loan paid W. the \$3000, which was the total purchase money for the 220 acres, and another parcel of about 50 acres, and was the full value of both parcels. G. got the conveyance from W. of both parcels, and conveyed the 220 a. res to R. to carry out the scheme, and retained the 50 acres himself. In an action by the plaintiffs it was *held*, that on the conveyance of the 50 acres being executed to G., the land immediately became the property in equity of the plaintiffs. That the land was not subject to the claims of certain execution creditors of G., whose *fi. fas.* were in the sheriff's hands. But that a mortgage on the 50 acres, made by S., who had no title, could not be ordered to be removed by the mortgagee (although the mortgage money was paid), as the mortgagee was no party to the action.

THIS was an action brought by the Hamilton Provident and Loan Society against John Darling Gilbert, Julia Ann Gilbert, Everesa Hastings Coleman, James B. Morden, and Benjamin Stiles, to follow certain moneys which it was alleged had been obtained from the plaintiffs by fraud and misrepresentation, and invested in land, and to recover the land.

The plaintiffs' statement of claim alleged: that the defendants J. A. Gilbert, Coleman and Morden were, previous to the year 1880, creditors of the defendant, J. D. Gilbert, and shortly thereafter recovered judgments for their claims, and placed *fi. fas.* against his lands in the hands of the sheriff, which *fi. fas.* had been kept renewed, and were in force; that about June, 1880, the defendant J. D. Gilbert applied to the plaintiffs for a loan of \$3700 on the security of 220 acres of land, through one Ross, who was put forward by him, and was a mere instrument in furthering the scheme, upon the representation that the said Ross had purchased the said 220 acres from one Wragge for \$7500 and had paid \$4000, and was desirous of obtaining the loan

to pay the balance and complete the purchase; and that upon such representations the plaintiffs lent him the sum of \$3700 on the security of the said 220 acres; but all the money that was paid to Wragge was the sum of \$3000, part of the said loan of \$3700 which was advanced by the plaintiffs, and which \$3000 was the purchase money in full not only of the 220 acres but of an adjoining parcel of about 50 acres, and was the full market value of both parcels together; that Wragge conveyed both parcels to Gilbert, and Gilbert conveyed the 220 acres to Ross and retained the 50 acres; that the defendants J. A. Gilbert, Coleman, and Morden were requested to waive their executions against the lands and had declined; and that the defendant Stiles, to assist said Gilbert in retaining said 50 acres, had in April, 1882, without any title, then made a mortgage on it to one Seymour for \$500 and received \$200, which \$200 Seymour had subsequently recovered from him in an action for the amount; but that the mortgage still appeared in the registry office as a cloud on the title, and Stiles had been requested to remove it, and had not done so; that Stiles pretended that he was the owner and had not registered his conveyance, and refused to register it or explain his title, or to execute a release to the plaintiffs.

And the plaintiffs claimed that Gilbert might be ordered, to convey and deliver the 50 acres to them; that the execution creditors might be ordered to release the parcel from the operation of their executions; that Stiles might be ordered to remove his mortgage from the registry office and asked for their costs.

The defendant J. D. Gilbert denied the allegations as to fraud and misrepresentation, and alleged that the plaintiffs agreed to make the advance on the security they received; and set up a judgment that had been recovered by the plaintiffs against him and Ross and one Patterson for the same cause of action, as a bar to this suit.

The execution creditors relied upon their executions. The case was heard at the Spring Sittings at Belleville, on 2nd April, 1884, before Ferguson, J.

The facts as found upon the evidence sufficiently appear in the judgment of the learned Judge.

Muir, for the plaintiffs. What is claimed in this suit could not have been obtained in the former suit, so there is no estoppel and there is no merger: *Nelson v. Couch*, 15 C. B. N. S. 99. The money is distinctly traceable here. It went into the bank and was checked out by the solicitor and went into the land as the evidence shows; but it was the clients money all the same: *Hopper v. Conyers*, L. R. 2 Eq. 549. The money used in purchasing the land was fraudulently obtained from the plaintiffs, and the trust of the legal estate resulted to them: *Wilson v. Owens*, 26 Gr. 27; *Fleury v. Pringle*, 26 Gr. 67. Money, however obtained, may be traced, and the Court will endeavour to secure it: *Merchants Express Co. v. Morton*, 15 Gr. 274. An execution only binds the rights and interests of the defendant: *Blackburn v. Gummerson*, 8 Gr. 331. The following cases were also referred to: *Taylor v. Plumer*, 3 M. & S. 562; *Reid v. Kennedy*, 21 Gr. 86.

Alcorn, for the defendant, John D. Gilbert. The action should be dismissed. The application for the loan was signed by Ross, and there is no evidence to connect Gilbert and Ross, no representations by Gilbert proved. The recovery of damages in the former action is a bar here. There is no resulting trust, and even if there was it was an existing fact at the time the former action was brought. The rule does not apply to any but purchasers: *Lewin* on on Trusts, 6th Ed. 126, 150. The plaintiffs must show that the purchase was made on their behalf and with their money: *Wilde v. Wilde*, 20 Gr. 521.

McNee, for the defendant, Julia Ann Gilbert. No lien declared now can take precedence of the executions against the lands. The claim of the former suit was a debt, and the damages are subject to the account: *Crop v. Norton*, 9 Mod. 233; R. & J. Dig. 1938: *Watson's Compendium of Equity*, 870.

Clute, for the defendant, Coleman. My client has pursued the course the law provided, and has done nothing wrong. The plaintiffs must show a resulting trust or where money may be followed: *Re Hallett's Estate*, 13 Ch. D. 696. There must also be a fiduciary relationship. When there has been a parting with the money it cannot be followed. The plaintiff's strongest point is, that a fraud was committed. They took proceedings, and they got judgment for the whole amount.

Muir, in reply. Coleman should have released on request by the plaintiffs. The Court can decree the cancellation of the mortgage to Seymour: *Dynes v. Bales*, 25 Gr. 593. I also refer to the judgment of Mr. Justice Taylor, in *Blain v. Smith*, reported in the Manitoba Law Journal for January, 1884.

June 28, 1884. FERGUSON, J.—The plaintiffs ask that the defendant Gilbert be ordered to convey the 49 $\frac{7}{16}$ acres of land to them, and as I understand the prayer, that he be ordered to give possession of the same parcel of land to the plaintiffs.

2. That the defendants other than Gilbert and Stiles, namely: Coleman, Morden, and Julia Ann Gilbert, each of whom has an execution against lands in an action against Gilbert, in the hands of the sheriff to be executed, to release this parcel of land from the operation of these executions.

3. That the defendant Stiles be ordered to remove the mortgage made by him to Seymour from the "files" of the registry office.

4. Their costs of suit, and lastly general relief.

There is, I think no doubt whatever that the purchase money paid by Gilbert for this parcel of land was obtained by him through Ross, who was only an instrument in Gilbert's hands, from the plaintiffs, by and through the grossest kind of fraud and misrepresentation. The transaction on his part (whereby the money was gotten from the plaintiffs) was, I think, a villainous one, and, I think

the money so obtained from the plaintiffs has been fairly and sufficiently traced; and that it has been shown that a part of it was the purchase money of this land; and I think that so far as the defendant Gilbert is concerned this land represents money that he obtained from the plaintiffs by fraud.

Sutherland in his evidence says, that Gilbert told him that all he had made out of this transaction was this parcel of land, and, I am much at a loss to see why he should be permitted to make and retain anything out of such a transaction.

The plaintiffs in their pleadings say, that immediately upon the execution of a conveyance to Gilbert, there was a resulting trust of this land in their favour.

It was by the defence objected that there is no such resulting trust except in cases in which the purchase money paid was given upon trust; and, even admitting that the money was fraudulently obtained by Gilbert from the plaintiffs, no such trust arose; and passages from *Lewin on Trusts*, and some cases were cited in support of this statement of the law.

It was also argued that there could not be a tracing and following of the money as trust money to the land into which it was converted, because it was not trust money. Money obtained by fraud or fraudulent misrepresentation, might be recovered upon the count for "money received to the use of the plaintiffs," under the former method of pleading, and it was said that this was the only trust recognized at law.

In the case, *Merchants Express Co. v. Morton*, 15 Gr. at p. 278, the late Chief Justice says: "Mr. Crooks puts it upon the principle of a resulting trust arising from the purchase of property by one with the moneys of another, and upon the principle of the Court following moneys or other property; and fastening upon them in favour of the true owner. The latter principle has been usually applied to the case of trust moneys; but I incline to think that it is applicable to other moneys and other property, and

that, if the Court can trace money or property, however obtained from the true owner, into any other shape, it will intervene to secure it for the true owner, by holding it to be his in equity, or by giving him a lien upon it." And this principle was applied by the learned Judge in that case, which was one in which the securities in question had been stolen, or obtained by robbery.

I think the same principle may be applied in this case, by declaring that this parcel of land became, immediately upon its being conveyed to the defendant Gilbert, the property, in equity, of the plaintiffs (for there is no pretence that any money but the money obtained from the plaintiffs—by fraud or misrepresentation as before stated—was employed in the purchase of the land) and that the land, for anything that appears, has since continued to be, in equity, the plaintiff's land.

Then, this being so, the writs of the defendants who are execution creditors of Gilbert would not, and did not attach upon the land. Their rights are only apparent, not real.

The defendant Gilbert in his defence sets up the fact that the plaintiffs had, by a former action, sued and recovered a judgment for damages for a cause of action which is identical with the one in this action; and it was persistently contended that, for this reason, the plaintiffs could not succeed. I have examined the pleadings and such parts of the proceedings as were relied on in that suit, and I am of the opinion that this defence cannot prevail; because it does not appear that the former suit was one in which the plaintiffs might have recovered precisely that which they seek to recover in this suit.

Then as regards the alleged cloud upon the title. This is by reason of a mortgage from the defendant Stiles to one Seymour; and Seymour is not a party to this action. There was not any title in Stiles; but as to the mortgage itself Seymour is in the position of mortgagee, and, in form at all events, the interest is in him, and I find a difficulty in ordering the registration of this mortgage to be amended

in the absence of Seymour the mortgagee. I think I cannot do so.

I do not think I can order the defendants, who are execution creditors of Gilbert, having their writs against lands in the hands of the sheriff, to release the lands from the operation of these writs; but, instead of this, there may be a declaration that the lands were and are the lands of the plaintiffs and not the lands of Gilbert; and therefore not subject to the operation of these writs against Gilbert. In all other respects I think the plaintiffs entitled to what they have asked, and to their costs of suit against all the defendants. If any difficulty arises in settling the form of the judgment, I may be applied to in Chambers.

Judgment accordingly.

G. A. B.

[CHANCERY DIVISION.]

THE CARLING BREWING AND MALTING COMPANY V. BLACK

Assignment for the benefit of creditors—Notice of claims—Liability after estate divided—R. S. O. ch. 107, sec. 34—46 Vic. ch. 9, O.

H. A. B., being unable to pay his creditors in full, made an assignment to E. F. B. for their benefit. E. F. B. advertised in the *Ontario Gazette* and a local paper, under R. S. O. ch. 107, as amended by 46 Vic. ch. 9, O. for all creditors to send in their claims and by his clerk C. E. B. sent notices to each creditor from a list furnished by the assignor to said C. E. B., which list he said must have contained the names of the plaintiffs and C. & Co., who had assigned a claim they had to the plaintiffs. No claim was sent in under the notice by either the plaintiffs or C. & Co., and the defendant distributed the estate without regard to the plaintiffs or C. & Co.

At the trial it appeared that E. F. B. had H. A. B.'s books, in which there was a credit to the plaintiffs and C. & Co.; that H. A. B. told him before he divided the estate that C. & Co. had sued him, and on the day of the division he received a letter from plaintiffs' solicitor notifying him. No proof was given of the posting of the individual notices to either plaintiffs or C. & Co.

Held, that the defendant had notice of the plaintiffs' claim, and that he was liable to the plaintiffs for their and C. & Co.'s proper dividend on the estate.

A trustee is not exonerated by the Act if he had actual notice of the claim before distribution, even though he may have sent the notice prescribed, and received no response to it.

THIS was an action brought by the Carling Brewing and Malting Company against Edward F. Black for an account of the estate of Hugh Alexander Black, which had been assigned to him for the benefit of creditors; and for the dividends due the plaintiffs on the amounts due them and the firm of Carling & Co, the claim of the latter having been assigned to the plaintiffs before action brought.

The case was tried at the Sittings at London, before Ferguson, J., on the 24th November, 1883.

The evidence shewed that Hugh Alexander Black had made an assignment of all his estate for the benefit of his creditors to the defendant Edward F. Black; that the defendant had advertised (for all creditors to send in their claims) in the *Ontario Gazette*, and in a local paper, and had, through his clerk C. E. Black, who had previously been a clerk of H. A. Black, sent out notices to the same

effect; and that C. E. Black addressed these notices from a list of creditors handed to him in the presence and at the request of the defendant.

The defendant admitted on his examination that he saw the list handed to C. E. Black before the notices were sent; that he had no doubt it contained the names of The Carling Brewing and Malting Company and Carling & Co.: that he had possession of the books of H. A. Black two or three days after the assignment, in which books both the plaintiffs and Carling & Co. appear as creditors; and that H. A. Black had told him previous to distributing the estate that Carling & Co. had sued him.

The bookkeeper of the plaintiffs was examined, and said that he had no recollection of the receipt of any notice, and that if any such notice had been received it would have come to him.

The plaintiffs sent in no claim to the assignee, pursuant to the notice, and the defendant distributed the estate without paying them any dividend or retaining any sum for that purpose.

Street, Q. C., for the plaintiff. The plaintiff is entitled to a judgment in his favour. R. S. O. c. 107, s. 34, does not help the defendant, who had a plain duty to perform. If the defendant had no notice of the plaintiffs' claim, he would be absolved; but he had notice. See also s. 31 of same Act: *Jervis v. Wolferstan*, L. R. 18 Eq. 18; *Wood v. Weightman*, L. R. 13 Eq. 434. The trustee cannot say he is justified because the claim was not put in: *Newton v. Sherry*, 1 C. P. D. 246.

Meredith, Q. C., for the defendant. The public notice to the plaintiffs to prove their claim is not denied, and there is a presumption that the private notice was received. What the plaintiffs did in effect waived any claim they had under the assignment. There was an estoppel by conduct, as in *Pickard v. Sears*, 6 A. & E. 469. In *Andrews v. Maulson*, 1 Chy. Ch. 316, a creditor who came in after notice was allowed to come in only on payment of costs. The words

"has then notice," in sec. 34 of the Act, mean notice by virtue of a claim sent in pursuant to the notice; sec. 34 applies only to executors or administrators, and not to trustees. Under Con. Orders p. 390 Sch. B., No. 1, the consequence of default in sending in a claim pursuant to the advertisement under a decree or order is, that persons failing to *send in* claims are peremptorily excluded from the benefit of the estate. The proper order, if the plaintiffs are allowed to come in, is one for the administration of the estate, and the costs should come out of the estate. In any view the defendant acted *bond fide* as a trustee, and the plaintiffs have been careless, and the defendant ought not to be made pay costs.

Street, Q. C., in reply. The Act is different from the Chancery Orders. By the Orders claims are to be barred unless sent in. The statute only bars claims of which the trustee had no notice. The trustee here has been grossly negligent towards the plaintiffs. There should be a judgment against the defendant for the amount and costs.

July 2, 1884. FERGUSON, J.—On the 28th April, 1883, one Hugh Alexander Black made an assignment of all his stock in trade, goods, merchandise, and all his property and effects of every description, to the defendant, upon trust, to pay certain expenses in the deed of assignment mentioned or referred to, and then to pay and discharge all the debts owing by the assignor; but in the event of the estate not being sufficient for such payment, then to pay and divide the same amongst the creditors of the assignor *pro rata* according to the amount of their respective claims. The defendant accepted the assignment and took upon himself the burden of the trusts of the same.

At and prior to the date of this assignment the plaintiffs were creditors of Black, the assignor, in the sum of \$168.50, and Carling & Co. were also creditors for the sum of \$131.67, and Carling & Co. assigned their claim to the plaintiffs. The total claim of the plaintiffs, as shewn by the evidence of Woodward, the plaintiffs' book-keeper, is \$300.17.

There was no question as to the validity of the assignment or the reality of the plaintiff's claim.

The evidence shewed that the whole amount realized for the estate was \$1092.40, and that the expenses were \$129.52. The total amount of the claims sent in and established before the assignee was, as shewn by the evidence, \$2309.23. On the 12th July, 1883, the estate was distributed. The plaintiffs' claim was not sent in to the assignee, the defendant, and was not taken into account in this distribution.

The plaintiffs bring this action, complaining that the defendant wilfully and in breach of his duty as such trustee, neglected and refused to pay them any part of their claim, and that they were wholly excluded by the defendant from sharing in the estate ; and they claim :

1. That an account may be taken of the estate.
2. That the defendant be ordered to pay to them the dividends or shares that should have been paid to the plaintiffs and Carling & Co. respectively, with interest and
3. That the defendant be ordered to pay them their costs of suit.

The defendant in his statement of defence says that on the first day of May, 1883, in pursuance of the provisions contained in the assignment, and of section 34 of ch. 107, R. S. O., as substituted by section 1 of ch. 9, of 46 Vict. (Ont.) he caused to be given to the several persons and firms with whom the assignor appeared to have had dealings, amongst whom were the plaintiffs, a notice in the words and figures following :

“ In the matter of Hugh A. Black, of the town of Wingham, in the county of Huron, liquor merchant.

The above-named H. A. Black, has, by indenture bearing date the 28th day of April, inst., assigned and transferred his estate to the undersigned as a trustee for the division thereof among the creditors of the said H. A. Black ; and all persons having claims against the said H. A. Black are requested to send their names, residences, and

particulars of claim duly verified, and the nature of security (if any) held by them, to the undersigned on or before the 15th day of June next; and as soon as possible thereafter the undersigned will proceed to distribute the assets and estate in his hands ratably amongst the parties entitled in accordance with the provisions of the said trust deed, and chap. 107 of the Revised Statutes of Ontario, having reference only to the claims notice of which shall have been given as above directed.

"May 1st, 1880."

"E. F. BLACK,

"Wingham,

"Trustee of said Estate."

That on or about the said 1st day of May, he caused copies of this notice to be inserted in five successive issues of the *Times* and *Advance* newspapers published in Wingham, and also caused the said notice to be inserted in the *Ontario Gazette*: that the plaintiffs did not give him any notice of their claim before the said 15th day of June, nor at any time thereafter: that some time after the expiration of the notice so given by him to the creditors to send in their claims he distributed the proceeds of the estate *pro rata* amongst the parties of whose claims against the estate he had then notice, and that at the time of such distribution he had no notice of the plaintiffs' claim. He also adds that he has carried out the trusts of the deed of assignment and distributed the assets of the estate in accordance with the terms of the deed and the provisions of the statute, and submits that he should not be called upon to pay the costs of the action.

The place of business of the assignor before and up to the date of the assignment was at Wingham aforesaid. It was proved, I think, that this notice was published in the local newspapers mentioned from the first of May until the first of June. The *Ontario Gazette* of the 12th of May was produced, which contained a copy of this notice. The plaintiffs did not appear to complain of want of publication of the notice. The defendant also in his evidence said that the notice was sent by mail to the plaintiffs and Carling & Co. A postal card having a copy of the notice printed

upon it was produced apparently as a sample of the cards that were mailed to the creditors. The defendant also says that the assignor handed a list of his creditors to one C. E. Black, whom he (the defendant) employed to address the notices, and who had been in the employment of the assignor: that this list was given to C. E. Black at his, the defendant's, request in order that the notices might be sent to the creditors, and that he saw the list handed to C. E. Black before he addressed the notices. He says that at the time C. E. Black got this list he (the defendant) had not employed him at all, but he got him immediately afterwards to address the notices, and he thinks that he must have seen the list of creditors himself. It does not however appear I think that this list was in the possession of the defendant at any time.

The defendant says that he had the journal and ledger of the assignor in his hands two or three days after the assignment, and, as I understand, retained them. In these books were the accounts of the plaintiffs and of Carling & Co., one showing a credit of \$159.86, and the other a credit of \$94, and he says that he never asked the assignor about these accounts. He also said that before he divided the estate the assignor told him that he had been sued by Carling & Co. He divided the estate on the 12th day of July, and he says he did not pay the plaintiffs' claim because he got no notice from them. He says he did not know but that the plaintiffs' claim had been paid, and that he did not ask the assignor, about this though he was living in the same town at the time of the division of the estate. A letter was on the 10th of July written to the defendant by the plaintiffs' solicitors notifying him of the plaintiffs' claim, stating it to be \$197.13, and that there were *fi. fas.* in the hands of the sheriff of Huron for the amount, and asking to know how it was that the defendant became the assignee of the estate, and inquiring how much it would pay. The defendant says that he did not receive this letter until the 12th July, after he had made the distribution of the estate, by signing and sending the drafts for the

creditors. The defendant says that he did what he did under the advice of a solicitor, but that he did not consult his solicitor as to whether or not he should reserve anything to meet the plaintiffs' claim, and that he did not after receiving the letter from the plaintiffs' solicitor take any steps to stop the payment of the drafts he had sent to the creditors. It does not appear whether he could have done this or not.

Woodward, the plaintiffs' bookkeeper, is called by the plaintiffs, and he says that the notice by circular was not to his knowledge received, and if it had been received it would have come into his hands; but on cross-examination he says that he did not search for the notice, and that he would not pretend to speak from memory. Although the defendant says in his evidence that the notice was sent to the plaintiffs, what he says in regard to the list of creditors that was handed to C. E. Black shows that he did not know this of his own knowledge. This list of creditors was not produced, and secondary evidence of its contents was objected to, and I think rightly, but the defendant nevertheless argued in giving his evidence that the plaintiffs' name must have been on this list, and said that he knew that C. E. Black addressed the notices from the list, and so far as he knew this was the only means C. E. Black had of getting the names and addresses of the creditors.

C. E. Black is not called as a witness, and I think it is not proved that this notice was mailed to the plaintiffs or to Carling & Co. The evidence that if sent it was not received by the plaintiffs or Carling & Co. is very unsatisfactory indeed; but so far as this element of the case may be material, the onus was upon the defendant, to shew by reasonable evidence that the notice was mailed. It is true that if a letter, properly directed, is proved to have been put into the post-office or delivered to the postman, it is presumed, from the known course of business in that department of public service, that it reached its destination at the regular time, and was received by the person to whom it was addressed; but the evidence here does

not show that any letter containing this notice was properly addressed, and so put into the post-office, or delivered to any post-man; and I think that the contention, on the part of the defendant, that the plaintiffs are estopped by reason of their having received this notice, and their having made no response to it, cannot succeed; nor can the contention that the plaintiffs in this way waived any claim they had under the assignment.

The Act under which the defendant claims protection from liability is 46 Vic. ch. 9, (O.) which repeals sec. 34 of ch. 107 R. S. O., and substitutes for it a new section 34, which is as follows:

“34. Where a trustee or assignee acting under the trusts of a deed or assignment for the benefit of creditors generally, or a particular class or classes of creditors, where the creditors are not designated by name therein, or an executor or an administrator has given such or the like notices as in the opinion of the Court in which the trustee, assignee, executor, or administrator is sought to be charged, would have been given by the High Court of Justice in a suit for the execution of the trusts of such deed or assignment, or an administration suit (as the case may be) for creditors and others, to send in to such trustee, assignee, executor or administrator, their claims against the person for the benefit of the creditors of whom such deed or assignment is made, or the estate of the testator or intestate (as the case may be), such trustee, assignee, executor, or administrator shall, at the expiration of the time named in the said notices, or the last of the said notices, for sending in such claims, be at liberty to distribute the proceeds of the trust estate, or the assets of the testator or intestate (as the case may be), or any part thereof, amongst the parties entitled thereto, having regard to the claims of which such trustee, assignee, executor or administrator *has then notice*, and shall not be liable for the proceeds of the trust estate, or assets (as the case may be), or any part thereof, so distributed to any person of whose claim such trustee, assignee, executor or administrator has not notice at the time of the distribution thereof or a part thereof (as the case may be); but nothing in this Act contained shall prejudice the right of any creditor or claimant to follow the proceeds of the trust

estate or assets (as the case may be), or any part thereof, into the hands of the person or persons who may have received the same respectively."

On the part of the defence it was contended that the words "has then notice" in this section mean, has then notice by reason of a claim sent in to the trustee, &c., pursuant to the notice given by the trustee, &c., and that the meaning of the words, "had not notice at the time of the distribution thereof," in the same section, have the same limited signification. This contention leads directly to the conclusion that no matter how well the trustee, executor, or administrator may be otherwise advised or informed of the claim of a claimant at and before the time at which he makes the distribution of the estate or assets, he may make the distribution regardless of the claim of which he has actual notice, unless he has received from the claimant a notice or statement of his claim in response to the notice given by him, the trustee, executor, or administrator. I am not of this opinion, and I think the course adopted by the Court in the case *Newton v. Sherry*, 1 C. P. D. 246, shews that such was not the view taken by the Judges of the English Act, which, in this respect, is the same as the Ontario Act. There the case stood over for the examination of the administratrix as to whether or not at the time she parted with the assets she had notice or knowledge that the claimant was living. I think the Act does not protect a trustee, executor, or administrator who distributes the estate or assets, as the case may be, regardless of a claim of which he has, at the time of the distribution, notice such as the law considers good notice, though the claimant may not have sent in his claim or notice of it in response to the notice given by the trustee, &c. The trustee or executor cannot, I think, be allowed to say to a claimant or creditor, true it is that I knew perfectly well of your claim at the time that I made the distribution of the estate or assets, but you did not, in response to my notice, send in your claim, or notice of it, and for this reason I made

the distribution regardless of it, and I am not liable to you. I think such is not the meaning of the Act.

Then I think the evidence shews that the defendant had, before and at the time he distributed the estate, notice of the plaintiffs' claim. The books of the assignor were in his possession. He received them a very short time after the assignment and they contained entries shewing credits to the plaintiffs and to Carling & Co. He did not make any enquiry as to these of the assignor, though he might easily have done so. The assignor told him that he had been sued by Carling & Co., and he seems to have made no inquiry as to what the suit was for. It is not disputed that the writs of execution mentioned in the evidence were in the hands of the sheriff to be executed. On the day on which he made the distribution, he received the letter from the plaintiffs' solicitors giving him information directly of the claim of the plaintiffs, and of the executions in the sheriff's hands, and he made no effort to stop payment of the drafts he had issued in favor of creditors, and it does not appear that such an effort would have been fruitless. He says he did not pay the plaintiffs because he got no notice of their claim, evidently meaning that he got no notice of it in response to the notice given by him. These and the other circumstances appearing seem to me to show that the defendant stood in the position of one having notice of the plaintiffs' claim. I think he must be considered as having notice of it at and prior to the time of the distribution made by him, and I think he is not saved by the statute, even assuming that the public notice given by him was sufficient to satisfy what is contemplated by the Act. I think the defendant is liable to the plaintiffs for a sum equal to their proper dividend upon the estate.

From the figures, about which there seems to be no dispute, this sum can be readily ascertained. The solicitors can, if they choose so to do, fix the sum and have it inserted in the judgment when drawn up. If not, it must be settled by a reference to the Master at London.

The defendant has obstinately contested the plaintiffs' claim, and, as I have said, I think he was in the wrong. I am of the opinion that he should pay the plaintiffs' costs of suit.

There will be judgment as above for the plaintiffs, with costs.

G. A. B.

[CHANCERY DIVISION.]

CASNER V. HAIGHT ET AL.

Mortgage—Foreclosure—Right of mortgagor's wife.

Plaintiff, being the wife of A. W. C. who mortgaged his lands, she joining therein for the purpose of barring her dower, brought an action to be allowed to redeem the mortgaged premises after foreclosure by the mortgagee against the husband, but during the husband's lifetime. A demurrer to the plaintiff's statement of claim, on the ground that the plaintiff had no interest in the lands, and that her pleadings affirmed that her husband's interest had been foreclosed, was allowed.

THIS was a demurrer to the plaintiff's statement of claim in a suit brought by Julia Ann Casner against Isaac Haight, Annie C. Haight, and the Brant Loan and Savings Company.

The plaintiff's statement of claim alleged that the plaintiff is a married woman, the wife of Albert W. Casner; that under and by virtue of a certain mortgage dated 1st April, 1880, made by the said Albert W. Casner and the plaintiff, for the purpose of barring dower, to one Samuel Squire, and certain assignments thereof, the defendant Isaac Haight became the mortgagee of the north part of lot 24 in the 9th con. of the Township of Burford, containing 50 acres, to secure the payment of \$1600, with interest at 8 per centum per annum: that under and by virtue of a certain other mortgage, dated 4th February, 1882, made by said Albert W. Casner and the plaintiff, for the purpose of barring

dower, to one Terence Jones, and certain assignments thereof, the said defendant Isaac Haight became the mortgagee of the same premises to secure the payment of a further sum of \$400 and interest at 10 per centum per annum: that the whole of the said principal moneys and certain interest are due on both said mortgages: that before the making of the said mortgages the said Albert W. Casner was the owner of the said lands: that on the 13th April, 1883, the defendant Isaac Haight issued a writ of summons against the said Albert W. Casner specially endorsed as follows "The plaintiff's claim is on a mortgage dated 4th February, 1882, made between said Albert W. Casner and one Terence Jones, and assigned by said Terence Jones to said plaintiff by assignment dated 22nd September, 1882, on the said lands, to secure \$400 and interest. The following are the particulars:—Principal \$400; interest from 4th August, 1882, to judgment, at the rate of 10 per centum per annum claiming an account; foreclosure of the lands and immediate possession" of the lands hereinbefore described; and after certain proceedings he obtained, on the 18th December, 1882, a final order of foreclosure, foreclosing all the right, title, and equity of redemption of the said Albert W. Casner in and to the said lands: that since the granting of the said order the said defendant Isaac Haight has mortgaged or attempted to mortgage the said lands to the said Brant Loan and Savings Company, and conveyed or attempted to convey the said lands to the said defendant Annie C. Haight: that since the granting of the said order the said Isaac Haight has entered into possession of the said lands except a small portion thereof reserved to the said plaintiff, in and by a certain lease of said lands made by the said Albert W. Casner to one Hugh Clark Hanmer, dated 11th July, 1881, and has committed waste thereon by cutting wood: that the defendant Annie C. Haight since the conveyance to her has committed waste thereon; that the plaintiff is entitled to the equity of redemption in the said mortgaged premises. And the plaintiff claimed to be let in to redeem the said lands, and asked a conveyance

upon payment of the amount due, and an injunction to restrain the waste.

The defendants Isaac Haight and Annie C. Haight demurred to the plaintiff's statement of claim, on the ground that it did not show that the plaintiff had any right, title, interest, or equity of redemption in the lands in question, and that the said statement affirmed that the interest of Albert W. Casner, the husband of the plaintiff, had been foreclosed.

The demurrer was argued before Proudfoot, J., on September 17th, 1884.

Moss, Q. C., for the demurrer. The plaintiff is a married woman whose husband is alive, and she is not now entitled to dower in her husband's estate. There were two mortgages and she barred her dower in both, although it was not actually necessary that she should do so in the second.

V. McKenzie, Q.C., contra. The plaintiff is a tenant of part of the lands, and her title as such has not been foreclosed: *Martin v. Miles*, 5 O. R. 404. Under the Dower Act of 1879, 42 Vict. ch. 22, O., she is entitled to her dower although her husband has been foreclosed. Her joining in the mortgages is only a mortgage of her dower, and she was no party to the foreclosure suit. Where a wife joins in a mortgage of her husband's estate as a security to the mortgagee, and for no other purpose, she parts with her dower only so far as may be necessary for that purpose and she is a necessary party to a subsequent sale by the husband free from dower: *Forrester v. Laycock*, 18 Gr. 611; *Rowe v. Wert*, 7 P. R. 252; *Calvert v. Black*, 8 P. R. 255. An inchoate right to dower is salable: *Allen v. Edinburgh Life Assurance Co.*, 25 Gr. 306. The Act should be liberally construed, and even if the wife had no right to redeem by virtue of her dower, her interest as tenant was not foreclosed.

Moss, Q.C. The statement of claim does not show the plaintiff to be a tenant, and she does not base her right to redeem on her right as a tenant, but only by virtue of her

right to dower. The foreclosure is only in respect to the second mortgage, which was made subsequent to her lease, if any, and she therefore is not entitled to redeem as she is the owner of a paramount estate. Nothing has overruled the doctrine laid down in *Moffatt v. Thompson*, 3 Gr. 111, where it was held, that the wife of a mortgagor was not a necessary party to a suit for foreclosure, although it has been held that she may not be an improper party. A wife has no right to dower in her husband's equitable estates during his lifetime: *Smith v. Smith*, 3 Gr. 457; *Re Robertson*, 25 Gr. 280, 486. The question never can arise during the lifetime of the husband. See remarks of Proudfoot, V. C., at p. 505. That case was decided before the statute was passed, and it is generally understood that it was passed to give effect to that judgment of the Court. A bar of dower in an equity of redemption, when it has already been barred in the legal estate, is no consideration at all: *Beavis v. McGuire*, 7 A. R. 713.

September 17, 1884. PROUDFOOT, J.—I think the demurrer must be allowed on both grounds, but the plaintiff is to be at liberty to amend upon payment of costs, if she is so advised.

G. A. B.

[COMMON PLEAS DIVISION.]

LANDREVILLE V. GOUIN.

Snow and ice falling from roof of house—Liability—Notice—By-law.

In an action for damages sustained by the plaintiff by reason of ice and snow falling from the roof of the defendant's house and injuring him while he was walking on the highway, evidence was given to shew that about half an hour before the accident happened the defendant was notified of the dangerous character of the roof, but took no precautions to guard against accidents, and a by-law of the municipality was proved requiring the citizens to keep their roofs clear of ice and snow.

Held, that there was evidence to go to the jury of negligence in the defendants. A nonsuit entered at the trial, was therefore set aside, and a new trial granted.

Lazarus v. Corporation of Toronto, 19 U. C. R. 9, commented on and distinguished.

THIS was an action for damages to the plaintiff, caused by the falling of snow and ice from the roof of the Russell House, Ottawa, of which the defendant was the proprietor.

The cause came on for trial before Rose, J., and a jury, at Ottawa, at the Spring Assizes of 1884.

It appeared that the roof of the house sloped towards the street, and was covered with tin.

There was evidence given to shew that the defendant was notified about half an hour before the accident that there was danger of snow and ice falling from the roof. The ice and snow in falling struck the plaintiff on the head, taking off a portion of the scalp, and broke his arm near the shoulder.

The plaintiff tendered as evidence a copy of a municipal by-law requiring citizens to keep the roofs of their houses free from snow. This was objected to as not being properly proved.

The learned Judge held that it was not receivable, but leave was given to the plaintiff to apply to the Court to put in a properly proved copy on the motion for an order *nisi*.

At the close of the case a nonsuit was moved for, on the ground that there was no evidence of negligence to go to the jury.

The learned Judge considered he was bound, on the the authority of *Lazarus v. Corporation of Toronto*, 19 U. C. R. 9, to enter a nonsuit.

In Easter Sittings, May 22, 1884, *H. Cameron*, Q. C., obtained an order *nisi* to set aside the nonsuit, and for a new trial, on the ground of misdirection, and on the law and evidence, and on affidavits and a certified copy of the by-law. The affidavits were directed to shew that the notice given by the police to remove the snow was given some days before the accident.

During the same term, June 5, 1884, *Hector Cameron*, Q. C., and *Frank Macdougall*, supported the order. The new trial is asked for on two grounds, namely, on the law and evidence, and for the discovery of fresh evidence. The plaintiff contends that the evidence shews that the chief of police notified the defendant to remove the snow from his building before and on the day of the accident. The learned Judge at the trial seemed to think that the evidence on this point was not very strong, and to remove all doubt the affidavits are now put in shewing that notice was given to the defendant several days before the accident. The fact of notice having been given clearly distinguishes this case from *Lazarus v. Corporation of Toronto*, 19 U. C. R. 9. The defendant admitted that he had taken no steps to remove the snow from the roof, or to guard against its sliding off the roof and falling on persons passing on the street below until after the accident happened. This case is also distinguishable on a further ground. In *Lazarus v. Corporation of Toronto*, it appeared that the defendants were the lessees of the upper flat, and not of the whole building, and the Court decided that, as the defendants were merely lessees of such upper flat, no liability attached against them; and anything further that may have been said as to non-liability was merely an *obiter dictum*, and the Court now is in no way bound by it. The authority of that case is shaken by subsequent decisions. In *Skelton v. Thompson*, 3 O. R. 11, it was stated that

in such a case as this the defendant would be liable. See also *Sharp v. Powell*, L. R. 7 C. P. 253. The American cases are clearly in the plaintiff's favour, and they proceed on the principle laid down in *Fletcher v. Rylands*, L. R. 1 Ex. 265, L. R. 3 H. L. 330, that where a man permits a dangerous thing to be on his land he does so at his peril, and if it escape from his land he is liable for the consequences. The case of *Shipley v. Fifty Associates*, 101 Mass. 251 expressly decides that there is a liability for damage caused by ice or snow falling from the roof on a passenger in the street. See also *Leonard v. Storer*, 115 Mass. 86, where the principle, which it is contended is the gist of the decision in *Lazarus v. Corporation of Toronto*, is conceded. Here a building is erected which has the effect of causing the snow, which would otherwise have fallen to the ground, to collect on the roof, and to slide therefrom, and by this means to become a source of danger to persons passing on the street below, by its so sliding off the roof and striking them. There is the additional fact that the roof was of tin, which in itself was dangerous, as the effect of the sun on it would cause the snow to melt and slide off. The learned Chief Justice, in *Lazarus v. Corporation of Toronto*, intimates that a public regulation for the removal of snow and ice from the roof might render the defendants liable; and we have now put in such by-law. Even if the by-law does not create any new liability, it is evidence of negligence. They further referred to *Kearney v. London and Brighton, &c., R. W. Co.*, L. R. 6 Q. B. 759; *Bryne v. Boadle*, 33 L. J. N. S. Ex. 13; *Scott v. London Dock Co.*, 34 L. J. N. S. Ex. 17; *Smith v. London and South Western R. W. Co.*, L. R. 6 C. P. 14; *Wharton on Negligence*, ed. 1874, secs. 842-3; *Garland v. Towne*, 55 N. H. 55; *Campbell on Negligence*, p. 52, sec. 58.

McCarthy, Q. C., contra. The affidavits filed are defective, because they do not shew that the evidence here attempted to be put in was not known to the plaintiff before the trial. [*Hector Cameron*, Q.C.—Anticipating that such objection might be made, an affidavit has been pro-

cured from the plaintiff shewing that he had no such knowledge, which we now ask leave to file]. The affidavit cannot be now filed. [*Hector Cameron*, Q.C.—The Court, under the Ontario Judicature Act and the present practice, will receive affidavits, though not in accordance with the old strict rules, and affidavits can be put in at any time. It is a matter for the discretion of the Court]. The Ontario Judicature Act has not altered the old practice in this respect. Subject to his objection, he read affidavits in reply, which he contended shewed that no notice was given. Assuming that notice was given, it was not sufficient. The defendant must have a reasonable time given him to remove the snow, and half an hour, which is the most the evidence shews, cannot be said to be a reasonable time. [CAMERON, C. J.—The defendant, if he had not time to remove the snow, might have stationed a man at the place to warn persons passing of the danger.] There is no such obligation. But there is no liability even after notice. The case of *Lazarus v. Corporation of Toronto*, 19 U. C. R. 9, was decided on the broad ground that there is no obligation imposed by law on persons to remove the snow and ice from their roofs and no liability imposed for accidents caused by its falling, and the decision in no way turned on the fact that the defendants were merely lessees of the upper flat. In order to recover in such an action as this, it must be on the ground of negligence. In what respect can there be negligence? The defendant had the right to erect the house on his land, and therefore the mere fact of this house being there cannot, nor can the fact of snow, which in the course of nature falls, being on his house, constitute evidence of negligence. The snow was there by no act of the defendant. This is a very different case from that of *Tarry v. Ashton*, 1 Q. B. D. 314, where a lamp projected over the street, and by reason of the fastenings of the lamp becoming out of repair it fell and injured a person passing along the street. The defendant was held liable in that case on the ground that as he maintained the lamp pro-

jecting over this highway for his own purposes, it was his duty to maintain it so as not to be dangerous to passengers on the highway. The case which most nearly resembles this is, *Welfare v. London and Brighton R. W. Company*, L. R. 4 Q. B. 693, where a plank and roll of zinc fell through a hole in the roof of the defendants' station, and the defendants were held not liable, because no negligence was shewn on their part. The principle on which *Fletcher v. Rylands*, L. R. 3 H. L. 330, is decided is, that where a person brings a dangerous element on his land he is bound to keep it in, and is responsible if it escape and damage his neighbour; for instance, where a man brings fire on his land, except where it is done for the purpose of cultivation, he must keep it in on his land, and is liable for the consequences if it escape and do damage. That is a very different case from the present one. The by-law also does not create any liability to have damages recovered against the defendant. All the by-law could do would be, to render the defendant liable to the fine or penalty imposed. Since *Lazarus v. Corporation of Toronto* was decided, the Legislature have from time to time amended the municipal law, and if it was intended to impose any such liability on the owners of houses they would have made it plain by an enactment to that effect. He referred to *Sharp v. Powell*, L. R. 7 C. P. 253; *Skelton v. Thompson*, 3 O. R. 11.

Hector Cameron, Q. C., in reply. The remedy by the by-law is merely cumulative, and proceedings may be had either at common law or by the by-law: *Eastern Archipelago Co. v. The Queen*, 2 E. & B. 879; *Regina v. Corporation of Yorkville*, 22 C. P. 431.

June 26, 1884. CAMERON, C. J.—I am unable to adopt the view that *Lazarus v. Corporation of Toronto*, 19 U. C. R. 9, precluded the Court in the present case from leaving the question of negligence to the jury. There is an element of negligence in this case that there was not in that, that is to say, the notification by the policeman to the defendant to have the snow

removed from the roof. This notification under the by-law was an intimation that the snow was then in a dangerous condition, and assuming the notification was in fact given, which was a question for the jury and not for the Court, the neglect to remove the snow entailed, in my opinion, as much liability on the defendant as there would have been if he had been told that there was a loose stone or brick in the cornice or wall that was likely to fall and endanger those passing below; and it is clear in such case the jury would have to decide whether the defendant had been negligent or not.

The language of the Judges in giving their opinions in *Lazarus v. Corporation of Toronto*, does undoubtedly go the length contended for by the defendant, that a liability does not exist at common law for an accident happening by the falling of snow from the roof of a house, without evidence of some construction of the roof that would be likely to cause the precipitation of the snow more dangerously than an ordinary construction would do.

The roof in the present case appears to have sloped towards the street, and was covered with tin, which in itself was something that called for the opinion of the jury when it is self-evident, though the method of construction was not an unusual method, that it would be more dangerous than a roof sloping from the street or a flat roof.

In *Skelton v. Thompson*, 3 O. R. 11, at p. 14, the present Chief Justice of Ontario, then presiding in the Queen's Bench Division, treats the head note to the case of *Shipley v. Fifty Associates*, 101 Mass. 251, a case not dissimilar to the present, as setting forth that which was a reasonable exposition of the law.

This head note is as follows: "For an injury resulting from the sliding of a mass of ice or snow from a roof upon a person travelling with due care upon the highway, the owner of the building is liable, if he suffered the ice and snow to remain an unusual time after he had notice of its accumulation and ought to have removed it."

The learned Chief Justice remarked: "When the owner

knows that ice or snow has accumulated on a sloping roof, liable of course, at any change of atmosphere" (? temperature), "or otherwise, to fall into a public street, he may properly be held responsible, if in reasonable time he do not take steps to prevent injury to a passer by."

The principle on which the case of *Skelton v. Thompson* was decided was, that the act complained of was not the *causa causans*, and that, without neglect or unreasonable delay in removing ice formed upon the side-walk by reason of water flowing in a harmless way on to the sidewalk from the water spout of a house and then freezing, the owner was not liable for an injury to a person slipping upon the ice so formed, whereby he sustained injury. Here there was evidence of knowledge that ought to have been left to the jury, and it was for them and not the Court to say whether half an hour was a reasonable time for the removal of the accumulated snow and ice upon the roof, and if not, whether the defendant ought not after such notice to have taken some means of warning passers by of their danger.

The case of *Lazarus v. Corporation of Toronto* was well decided on the facts of that case, as there was no evidence of any negligence whatever on the part of the defendants.

There is no doubt that the owner of property is not liable for the flow of water or the sliding of snow to the injury of another, when such water or snow falls upon his land in a state of nature, or upon an erection that would not cause it to flow differently from what it would if it had fallen on land in a state of nature. But when the owner of property by any act of his does anything to cause the water or snow to be precipitated on his neighbour in an unusual quantity or with unusual force to the detriment of that neighbour he becomes liable. It is his action, and not the action of nature, that does the mischief, though without the action of nature the mischief would not be done.

I presume if the defendant had had a cart load of

snow and ice placed upon his roof, and it had fallen, he could not avoid responsibility to any one using the highway injured thereby, if it were found a negligent act to so place it. I do not then on principle see how he can avoid such responsibility when he constructed his roof, or used the building with a roof so constructed by others, so as to cause the snow to slide and pack and overhang the highway, or to be precipitated thereon, when he has had reasonable notice of the dangerous condition of his roof from the snow and ice accumulated there.

The language of Blackburn, J., in *Tarry v. Ashton*, 1 Q. B. D. 319, fully supports the view of the defendant's responsibility.

In that case the defendant occupied a house which he rented with a lamp projecting over a public thoroughfare, which would do no harm as long as it was in good repair, but would become dangerous if it were allowed to get out of repair. Having stated these facts, Blackburn, J., said: "It is therefore not a nuisance of itself. But if the defendant knowingly maintained it in a dangerous state he would then be indictable for the nuisance. This much is clearly decided by *Regina v. Watson*, 2 Ld. Raym. 856, for the defendant was there held liable for not repairing his house which was on a highway and was ruinous and like to fall down, on the ground that as occupier he was bound to keep the house so as not to be a nuisance. As I have said, I do not wish to decide more than is necessary; and if there were a latent defect in the premises, or something done to them without the knowledge of the owner or occupier by a wrong doer, such as digging out the coals underneath and so leaving a house near the highway in a dangerous condition, I doubt—at all events, I do not say—whether or not the occupier would be liable. But if he did know of the defect, and neglected to put the premises in order, he would be liable. He would be responsible to this extent, that as soon as he knew of the danger he would be bound to put the premises in repair or pull them down."

This language applied to the circumstances of this case, assuming the defendant had notice of the dangerous condition of the snow, would clearly indicate the defendant would be responsible for the injury received by the plaintiff.

I do not think, as I have already said, *Lazarus v. Corporation of Toronto* is an authority that can be said on the facts there presented to be a decision that must necessarily govern this case, or is opposed on principle to the law laid down in *Tarry v. Ashton*, assuming that defendant had knowledge of the dangerous condition of the snow on the roof. If it is, it would go the length of deciding that if a chimney of the house had been struck by lightning which shattered it so as to be unsafe, the defendant, with knowledge of the fact, would not be bound to repair so as to make him responsible from an injury to anyone in the highway from the chimney falling to the ground. It appears to me, thus stated, it would be absurd to say that the law relating to this class of neglect will support such a proposition.

I am, therefore, clearly of opinion that the nonsuit ought to be set aside, and a new trial had between the parties, with costs to abide the event.

I will only add, the strongest case cited on behalf of the defendant in support of his contention, except *Lazarus v. Corporation of Toronto*, is *Welfare v. London and Brighton R. W. Co.*, L. R. 4 Q. B. 693, but that is clearly distinguishable.

ROSE, J.—The evidence for the plaintiff did not disclose any negligence in the construction of the roof, unless the fact that it had a slope towards the street, and was covered with tin, was such evidence. There was some slight evidence of the defendant having been notified about half an hour before the accident that there was danger of ice falling from the roof. In falling it struck the plaintiff on the head, taking off a portion of the scalp, and breaking his arm near the shoulder.

At the close of the case a judgment of nonsuit was pressed for, and reluctantly granted, on the authority of *Lazarus v. Corporation of Toronto*, 19 U. C. R. 9, which was a case of an accident from snow falling from the roof of St. Lawrence Hall, Toronto.

If *Lazarus v. Corporation of Toronto* can be distinguished, I am of the opinion there was evidence of negligence to go to the jury, and the order should be made absolute for a new trial. See *Shipley v. Fifty Associates*, 101 Mass. 251, (1869), cited in *Skelton v. Thompson*, 3 O. R. 11, 14.

Mr. Cameron endeavoured to distinguish *Lazarus v. Corporation of Toronto*, on the ground that, although the learned Judges expressed opinions which, if declaratory of the law, prevented the plaintiff's recovery, such opinions were *obiter dicta*. Unless they are such we are bound to follow the decision, and leave a higher Court to afford the relief sought by the plaintiff, if on a sound interpretation of the law he is entitled to relief.

As I understand it, an *obiter dictum* is an opinion expressed by a Judge in giving judgment which was unnecessary for the determination of the case, and upon which such determination did not rest. I do not understand that if a Judge rest his decision upon two different grounds, either of which is sufficient to support the decision, either of the grounds taken can be said to be but an expression of an opinion which was unnecessary for the determination of the case, and hence a *dictum* or *obiter dictum*, that is a *dictum* uttered in passing or merely incidental and unnecessary. See *Bouvier's Law Dictionary*, ed. of 1883, where the authorities are collected under the head "Dictum."

Endeavouring to apply this rule to *Lazarus v. Corporation of Toronto*, I find that Robinson, C. J., in giving judgment, p. 13, says; "What here occurred was such an accident as may occasionally happen, and be attended with serious results, but I do not think that in the absence of any public regulation on the subject people are compelled to keep the roofs of their houses clear of snow, or to detain

the snow on the roofs so that the snow cannot slide from them into the street. There may be in a particular case something so evidently faulty in the construction of a roof as to make it more likely to occasion accidents from this cause than roofs in general are, but I do not see any proof that such was the case here."

Mr. Cameron did not desire to amend to set up a claim under the by-law, admitting that the by-law gave no new cause of action to any private citizen, but was merely a municipal regulation to be enforced by the municipality—See remarks of Hagarty, C. J., in *Skelton v. Thompson*, 3 O. R. p. 15—but he urged that it was, in some sense, evidence of negligence.

I can hardly follow that argument. Neglect of duty to whom? Not to the plaintiff, else he might maintain an action for such negligence. To the municipality? Then how can such neglect avail the plaintiff?

Apart from the observation by Robinson, C. J., as to any public regulation, I understand him to lay down the proposition of law that no one is compelled to keep the roof of his house clear of snow or detain the snow on the roof so that it cannot slide from the roof into the street. He adds that faulty construction might give rise to liability, but says there was no evidence of faulty construction in that case. That opinion was sufficient to dispose of the case before him, and, as Mr. McCarthy urged, must be taken as his decision in preference to anything that followed. At that point his mind might rest. The plaintiff could not succeed. The general law was in his way, and the evidence did not bring him within the possible exception. The learned Chief Justice proceeds: "If that had been shewn, however," *i. e.*, if faulty construction had been shewn, "then on whom would it be incumbent in this case to make compensation?" And he determines that the defendant was not liable even on that hypothesis.

In the present case no evidence was given or argument offered to shew anything "so evidently faulty in the construction of the roof as to make it more likely to occasion

accidents from this cause than roofs in general are;" and therefore the only exception from the general proposition of law available under the opinion of that learned Judge cannot assist the present plaintiff. The opinion of that most eminent jurist, even if a *dictum*, has too much weight to be lightly disregarded, and I am somewhat relieved to find that, so far as I can judge, it is binding upon me.

The opinion of Burns, J., delivered in that case, does not require analysis. As Mr. Cameron admitted, it was strongly enough expressed to leave no doubt as to its effect.

McLean, J., concurred.

The judgment was given in 1859, and has remained unquestioned to this day. As Mr. McCarthy pointed out numerous amendments to the Municipal Act have been made, but there has been no attempt to remove its effect by legislation; and, so far as I am concerned, I must leave it to a higher Court to lay down a different rule for guidance. Had the matter been *res integra*, much could have been urged from analogy to other cases, chiefly in the United States, to support the plaintiff's contention.

In my opinion the order must be discharged, with costs.

Since writing the above I have had the privilege of reading the opinion of the learned Chief Justice of this Court in which my brother Galt concurs.

While I cannot see how, if there is no common law duty cast upon the defendant to "keep the roof of his house clear of snow, or to detain the snow on the roof, so that the snow on the roof cannot slide from it into the street," and no statutory obligation of which the plaintiff desires to avail himself, the mere giving of notice to do that which, as against the plaintiff, it was not his duty to do, can give a cause of action to the plaintiff, I am of the opinion that substantial justice will be done by granting a new trial, unless indeed the result be that the plaintiff recover a judgment, and be unable to support it.

GALT, J., concurred with CAMERON, C. J.

Order absolute.

[COMMON PLEAS DIVISION.]

LAW V. THE CORPORATION OF THE TOWN OF NIAGARA FALLS.

BAMFIELD V. THE CORPORATION OF THE TOWN OF NIAGARA FALLS.

Municipal corporations—Damage—Liability for overflow.

Many years before the defendant municipality was laid out, a culvert was constructed by Z. on private property for the benefit of a railway company whose lands adjoined the stream in question. By reason of the culvert, the water brought down by the stream was not carried off, but overflowed the plaintiff's land. The stream was the natural drain for the surrounding country, but the defendants used it to a small extent for the drainage of the town. It was found that the flooding would not have been occasioned by the water brought down through the defendants' user of the stream, but that water brought down from the area drained, apart from the defendants' user, would have alone caused the damage.

Held, that the defendants were not liable.

THESE were actions to recover damages for injuries caused by water overflowing the Muddy Run Creek, and flooding the plaintiff's premises. The cause of the flooding was the insufficiency of a culvert constructed by one Zimmerman, for the benefit of the railway company whose grounds adjoined the creek at this point. This culvert was constructed many years ago, before the town was laid out. It was not on corporation, but on private property. The western limit of the town was Concession Street.

The cause was tried before Osler, J. A., and a jury, at Welland, at the Spring Assizes of 1884.

At the close of the case the learned Judge left the following questions to the jury, the answers to which follow the questions :

1. In what respect, if at all, were the defendants guilty of negligence causing the damage complained of? A. The defendants were guilty of negligence in not having proper outlet to water.

2. Would the flooding of the plaintiff's premises have occurred from the water coming from the area drained by the town alone? A. No.

3. Would the water brought down the creek from the area drained by it west of Concession street have alone caused the damage complained of? A. Yes.

4. Damages in Law's case? \$250.

5. Damages in Bamfield's case? \$200.

On these answers the learned Judge made the following entry on the record in each case:

"The jury find that the injury complained of was not caused by the defendants. I direct judgment for the defendants, with costs."

During Easter sittings, *J. K. Kerr*, Q. C., obtained an order *nisi* in each case to set aside the judgment entered for the defendants, and to enter judgment for the plaintiffs, on the ground that the verdict was contrary to law, evidence, and the weight of evidence.

During the same sittings, June 3, 1884, *J. K. Kerr*, Q. C., shewed cause, and referred to *Northwood v. Corporation of Raleigh*, 3 O. R. 350; *Danard v. Corporation of Chatham*, 24 C. P. 590; *Coghlan v. Corporation of Ottawa*, 1 A. R. 54; *Bateman v. City of Hamilton*, 33 U. C. R. 244; *Mayor, &c., of New York v. Bailey*, 2 Denio 433; *Van Pelt v. City of Davenport*, 42 Iowa 308; *City of Madison v. Ross*, 3 Ind. 236.

Osler, Q. C., contra, referred to *Angell on Water Courses*, 7th ed., p. 118, sec. 108; *Bateman v. City of Hamilton*, 33 U. C. R. 244.

The arguments sufficiently appear from the judgment.

June 26, 1884. ROSE, J.—These cases come before us not by way of application for a new trial, but to set aside the judgment entered on the findings, and to enter judgment for the plaintiffs. We, therefore, must accept the findings, unless there is no law or evidence to support them. The grounds taken as to and the verdict being contrary to evidence, and weight of evidence, are not grounds to support the application. We cannot review the evidence, except to see whether any findings have been

recorded which were immaterial as not founded on evidence. It is not here contended that there is no evidence to support the findings.

The point taken for the plaintiffs is this: That the evidence disclosing that the defendants caused more water to flow into the Muddy Run Creek than would otherwise have found its way there, and damage having been caused by an overflow to which the defendants contributed, the defendants cannot be heard, as a matter of law, to say that the water which they caused to flow into the creek did not occasion the damage. That having used the creek as a part of the drainage system, it was the duty of the defendants to keep it free from obstruction, and the culvert proving an obstruction [it was the defendants' duty to remove it, or to provide some other outlet for the water.

It is clear, as a matter of law, that the municipality is not bound to provide drainage for the property within its limits: that if it construct drains or sewers to gather up the water, and they are so negligently constructed, or knowingly permitted to fall into or remain in a state of disrepair, or to be obstructed so as to prevent the water so gathered up finding a proper outlet, and thereby such water is brought upon property upon which it would not otherwise come, they are responsible for such damages as may ensue. In this case the defendants did not construct the sewer; it was not on their property; they had no control over it. The strongest position the plaintiffs can assume here is, that knowing the culvert to be insufficient in size to permit all the water flowing down the creek to find an outlet, they drained into it water which would not have otherwise flowed therein, and are liable for damage consequent upon the overflow.

Mr. Kerr pressed his argument to the length of urging that it was not necessary for the plaintiff to prove that such water so brought in by the defendants caused damage, but only that the stream or flood to the waters of which they contributed caused the damage, and cited a number of cases. I have referred to them all, but no case goes that length.

It is clear that if the culvert had been sufficient to carry off the water which flowed through it before the additional water was brought into it, and was not sufficient to carry off the additional water also, the party bringing in the additional water would be liable. That was the case in *Northwood v. Corporation of Raleigh*, 3 O. R. 347.

In that case, Boyd, C., says, at p. 358: "If an individual collects surface water dispersed over his land, which would naturally disappear by absorption or evaporation, and by means of a trench carries it off in a stream so as *appreciably* to injure his neighbours, he commits an unlawful act."

So, also in the case cited by the learned Chancellor, of *Geddis v. Proprietors of Bann Reservoir*, 3 App. Cas. 430, at p. 441, where Lord Hatherley states the main fact as follows: "It is in evidence in this case that the water did in fact flow over the plaintiff's land, and *did in fact damage it* as I have described. It is farther in evidence *that that was due to the additional quantity of water* which had been poured down by the defendants from the reservoir."

In *Coghlan v. Corporation of Ottawa*, 1 A. R. 54, where the defendants adopted a private drain as part of the drainage system and joined with it two drains, Patterson, J.A., at p. 60, says: "The plaintiff had a drain which was sufficient to carry away the water from his cellar. The defendants connect with it two drains of *more than double its capacity*."

In the present case the jury have found that the water brought down by the creek from the area drained by it west of Concession street, would have *alone* caused the damage complained of. Then the water coming from the area drained by the town did not cause the damage, it would have been caused had no water found its way into the creek except from the area drained by the creek west of Concession street. On such a finding how can a judgment be entered for the plaintiffs?

To give effect to the plaintiffs' contention would be to hold that if a man threw a gallon of water into a swollen

stream, he could not be heard to say that the gallon of water was not the water which caused the damage. The damage caused by the additional water must be "appreciable."

The whole area drained was, it is said, 3,000 acres. The total area in Niagara drained was at the outside 50 acres, and charging the defendants with draining this area into the creek it will be seen that they would be responsible for only 1/60 of the area drained. There is evidence that only two acres were added to the area by the defendants. If so, then they would be responsible for 1/1500. On such evidence and such findings I am of the opinion the judgment was properly entered, and the motions fail.

The case of *Bellamy v. City of Hamilton*, 4 C. P. 526, is much in point. See the judgment of Macaulay, C. J., at p. 535: "The jury seem to have been of the opinion that the * * defendants were not implicated to a degree that enabled them to discriminate and ascribe to their acts the damages sustained by the plaintiff to a tangible and definite amount."

I have looked at the following cases cited by Mr. Kerr, in addition to those above referred to: *Danard v. Corporation of Chatham*, 24 C. P. 590; *Bateman v. City of Hamilton*, 33 U. C R. 244; *Lawrence v. Great Western R. W. Co.*, 16 U. C. R. 643; *Brine v. Great Western R. W. Co.*, 31 L. J. N. S. Q. B. 101; *Corporation of Vespra v. Cook*, 26 C. P. 182; *VanPelt v. City of Davenport*, 42 Iowa 308; but do not find any support to the plaintiffs' contention in any of them.

I am of the opinion the orders *nisi* must be discharged, with costs.

CAMERON, C. J., and GALT, J., concurred.

[COMMON PLEAS DIVISION]

HEPBURN v. PARK ET AL.

Chattel mortgage—Fraudulent preference—Statute of Elizabeth, R. S. O. ch. 95 sec. 13—Consideration.

In order to create a fraudulent preference under the Statute of Elizabeth as interpreted by R. S. O. ch. 95, sec. 15, not only must there exist a fraudulent intent in the mind of the mortgagor, but also in that of the mortgagee.

In this case, which was that of a mortgage of goods : *Held*, that no such intent was shewn on the part of the mortgagee ; nor *Seemle*, on the part of the mortgagor.

Part of the consideration of the mortgage was covered by a draft drawn by the mortgagee, a merchant, in the course of business, on the mortgagor, his customer, and discounted at a bank.

Held, that the mere fact of the draft having been discounted at the bank would not justify the Court in assuming that the debt represented by the draft was paid, and that the remedy on the draft was to be alone looked to ; and therefore that the amount of the indebtedness in the mortgage could not be said to be untruly stated.

Meriden Silver Plating Co. v. Lee, 2 O. R. 451, commented on.

INTERPLEADER issue, to try the title to certain goods as between the plaintiff, the mortgagee of the goods, and Park and Griffith, the defendants, execution creditors of Osborne, the mortgagor and judgment debtor.

The cause was tried before Osler, J.A., without a jury, at Hamilton, at the Spring Assizes of 1884.

It appeared that part of the consideration of the mortgage was covered by a draft drawn by the mortgagee, a merchant, on the mortgagor, his customer, and discounted at a bank.

It also appeared that Osgoode had, subsequently to the mortgage, but prior to the issue of execution, made an assignment of all his estate and effects to an assignee for the benefit of his creditors.

The learned Judge delivered the following judgment, in which the facts are fully stated :

OSLER, J.A.—As to the facts : there is on doubt that a party attacking a transaction of this kind must shew that the person who received the chattel mortgage did so with the intent prohibited by the statute. It must be done with the intent of obtaining a preference. That is just as necessary to make out as that the debtor intended to prefer.

In *Brown v. Sweet*, 7 A. R. 725, that is laid down. So that, without saying more than if I had to deal only with the intent of Osgoode I should have very considerable difficulty in coming to the conclusion that he did not intend to prefer.

I have not the same difficulty with regard to the plaintiff. Hepburn is a man who is living at a distance, not in the same town as the debtor, and therefore perhaps had not the same opportunities of knowing what his position was as other creditors had who lived here. The application for the advance was made to him by the debtor, which he did not immediately accede to, but required some information to be given to him of the debtor's position, and a few days after the debtor and a solicitor came to see him on the subject, and he then received information of the debtor's position; and I cannot say he had no right to rely upon that. It was information which had been extracted at the instance of the other creditors, and they themselves were so far prepared to rely upon it that they would have allowed the debtor to be unmolested if he had given security: so that I cannot say that the plaintiff, in acting upon information given to him by Osgoode and a solicitor—which was not in fact untrue—I cannot say that, in acting upon it, he was not acting in good faith. He did make a substantial advance at the time, as compared with the amount of his existing debt—an advance of \$190. Although one cannot help suspecting in some of these cases that the creditor must have some knowledge of the position of the debtor, still I suppose as a Judge I ought to be satisfied there was an actual intent on his part to contravene the statute.

I cannot say, looking at the way in which the case is brought before me, that that intent did exist. Therefore, as far as that part of the case is concerned, I shall have to find that the mortgage does not contravene the Debtors Act, R. S. O. ch. 118.

Then comes the debt; and I have somewhat more doubt about that, from the fact that there had been a draft drawn upon the debtor payable to the bank. Still, in one point of view, that debt did exist, and a liability for it existed on the part of the drawers; they were liable to the bank.

Looking at it in a business way we know as a matter of business that people who are dealing with the bank are in the habit of going in with drafts received from their debtors and passing them in for discount, just as a matter of business

between themselves and the bank ; and the bank, although they look to the debtor and treat it as a sort of security, hold the original creditor for it, and he ultimately takes up the draft. The observations of Brett, L. J., in the case of *Credit Co. v. Pott*, 6 Q. B. D. 295, seem to me appropriate here. The question was, whether the facts as to the consideration in a bill of sale were stated with substantial accuracy. The learned Lord Justice observed, at p. 299 : " I am inclined to agree that such facts are not accurately stated, but then it will suffice if they are accurately stated, either as to their legal effect or as to their mercantile and business effect, although they may not be stated with strict accuracy."

So I cannot say the debt was not still existing in such a way as to enable the creditor justly to take the affidavit that the debtor was indebted to him as stated in the mortgage ; and there is the fact that the debtor recognized that state of things by covenanting in the mortgage to pay the debt, and accepting an extension. The debt not being payable as between him and the original creditor until the month of April, it is quite plain that Hepburn had, as between himself and the debtor, to take up and provide for the draft.

So I do not think I can come to the conclusion, as a matter of law, that there was not a debt existing which justified the plaintiff in taking the affidavit.

That would be sufficient to dispose of the case upon the issue as it is presented ; but I cannot help saying that, if I had to dispose of the case upon the other point, I could not follow the case of *Meriden Silver Plating Co. v. Lee*, 2 O. R. 451.

I cannot see how the execution creditors, who under their writs have no claim against the goods, can maintain an interpleader issue of this kind.

If the chattel mortgage is bad, perhaps the assignee might come in and defeat it ; but how the execution creditors, subsequent to the assignment, could do so either in aid of or in opposition to the assignee, I confess I am at a loss to see. If the Legislature say that they may, another state of things will arise ; but as it stands now, the execution creditor has no claim, in my judgment.

However, it is not necessary for me to do more than refer to that, because I decide the case upon the other ground.

Therefore, I find in favour of the plaintiff on the issue.

During Easter sittings, *Walker*, (of Hamilton,) moved, on notice, to set aside the judgment entered for the plaintiff, and to enter judgment for the defendants.

During the same sittings, May 30, 1884, *Walker*, (of Hamilton,) supported the motion. There was no existing indebtedness upon which the mortgage could be based, for the note which constituted the alleged debt belonged to the bank, and not to the plaintiff; and further, the mortgage does not state the consideration truly, namely, the fact of the existence of the note held by the bank: *Grant on Banking*, 4th ed, p. 291; *Parkes v. St. George*, 2 O. R. 342; *Ontario Bank v. Wilcox*, 43 U. C. R. 460. The next ground is, that the mortgage constituted a fraudulent preference. Hepburn knew that Osborne was utterly insolvent when the mortgage was executed. No pressure was used, the mortgage being given voluntarily; and as no debt was due, and the fresh advance was merely colourable to attempt to create a debt, the transaction in no sense can be supported: *Ex p. Hall, Re Cooper*, 19 Ch. D. 580; *Meriden Silver Plating Co. v. Lee*, 2 O. R. 451.

MacKelcan, Q. C., contra. There was clearly a debt due. It cannot be deemed that the draft drawn by the plaintiff on the debtor payable at the bank, constituted a transfer of the debt to the bank, and payment so far as the plaintiff was concerned. This was purely a matter of business between the bank and the plaintiff, the bankers looking to the plaintiff to see that it was paid: *Benjamin on Sales*, 3rd Am. ed., p. 823, sec. 835; *Lewis v. Mason*, 36 U. C. R. 590, 608; *Wiley v. Smith*, 2 S. C. R. 1, 10; *King v. Duncan*, 29 Gr. 113; *Baldwin v. Benjamin*, 16 U. C. R. 52. There was clearly no fraudulent preference. This was a matter of evidence, and the learned Judge who tried the case has expressly found that there was no such preference, and the Court will not interfere. There was no evidence to fasten on the plaintiff any fraudulent design. The plaintiff thought that Osborne would carry through, and the advance was *bond fide* made with that view, and

as the plaintiff knew that Osborne was a good man of business. The parties seeking to attack the mortgage should have given affirmative evidence of fraud. To create preference, there must be an intent on the part of the debtor to prefer, and cognizance on the part of a creditor. They attempt to shew knowledge through plaintiff's solicitor; but knowledge of a solicitor in such a case as this is not the knowledge of the plaintiff: *Brown v. Sweet*, 7 A. R. 725; *Ex p. Johnson, Re Chapman*, Weekly Notes, March 29th, 1884, p. 80; *Risk v. Sleeman*, 21 Gr. 250; *Gordon v. Young*, 12 Gr. 318; *Lamb v. Sutherland*, 37 U. C. R. 143. There having been an assignment here for the benefit of creditors, the defendants are not in a position to attack the mortgage.

June 26, 1884. ROSE, J.—The issue is to try the right of the plaintiff, mortgagee of chattels, as against the defendants, execution creditors, to the goods described in the mortgage.

There are only three points in the case raised by the defendants.

1. That the mortgages are fraudulent and void, as being given with an intent to delay, hinder, and defraud creditors, or a creditor," within the meaning of the Statute of Elizabeth, as interpreted by our Provincial Statute, R. S. O. ch 95, sec. 13.

2. That such mortgage is void for not stating the true consideration ; and

3. As arising out of the second objection—that the draft for \$400.33, being under discount at the date of giving the mortgage, the indebtedness represented by the draft could not form part of the mortgage debt, as it belonged not to the plaintiff, but to the bank.

The learned Judge sets forth in his judgment his findings and reasons therefor.

It is clear from the case of *Brown v. Sweet*, 7 A. R. 725, at p. 735, referred to in the judgment, that not only must a fraudulent intent exist in the mind of the mortgagor, but also in the mind of the mortgagee.

The late lamented Chief Justice of Ontario in giving judgment in that case says: "If the person lending money and taking security be innocent of any fraudulent intent, he cannot be affected by the fact, if it be a fact, that there was a fraudulent intent unknown to him in the mind of the borrower."

Reference to the judgment, and to that of Burton, J. A., will furnish further similar statements of the law.

I am also of the opinion that on the evidence no Judge would have been warranted in coming to the conclusion that such fraudulent intent existed in the mind of the mortgagee. Indeed I am led to the conclusion, from a careful perusal of the evidence, that such intent did not exist in the mind of the mortgagor. It is not shewn what became of the money obtained from the plaintiff, and unless we are to assume that he made improper use of it when no such evidence has been given, we must conclude that it formed part of his estate, and went to his assignee. I think he was endeavouring to obtain money to enable him to pay his other creditors on account of their claims, so as to induce them to extend the time for payment of the balance of the claims. It is sufficient, however, for us to say that on the evidence we are unable to say the conclusion of fact at which the learned Judge has arrived is not one at which he ought to have arrived, and so it must stand.

The mortgage states the true consideration, unless the draft for \$400, part thereof, had been taken as cash by the plaintiff, or as between the plaintiff and the bank, had been taken by the bank as cash, or had been purchased by the bank from the plaintiff.

The evidence states that at the time of giving the mortgage the draft had been discounted. What that meant was not explained, and the defendant must ask us to assume that it meant that the plaintiff had sold the draft to the bank, so that the property passed out of the hands of the plaintiff to the bank, and the plaintiff had received from the bank its value, so that the mortgagor became entitled

to have placed to the credit of his account with the plaintiff the value of such draft.

Of course parties may so deal. It might have been agreed between plaintiff and Osgoode, that when Osgoode gave him paper, he, the plaintiff, should take it as cash, and at once place its value as cash to the credit of goods account, so as to extinguish all liability for the goods and have remain only an indebtedness on the draft; and it might also have been agreed between the plaintiff and his bankers, that they should purchase the draft so that the property in it should pass to the bank, and that thereafter Osgoode should be their debtor, and not the debtor of the plaintiff, but all this we may not assume from the use of the word discount.

It is idle to affect ignorance of the usual way in which merchants deal, not only with other merchants who purchase from them, but also with the banks.

In my experience as a solicitor I knew of only one house that made an arrangement to discount their customers' paper, and place the proceeds to credit of goods account, thus paying for the goods and leaving the merchant to sue on the paper, and this paper was not the paper of the customer simply, but the paper of his customer, to whom he in turn had sold the goods. The well known custom, or usage among merchants and their bankers, is to obtain, what is called, a line of credit to a stated amount. This may be on customers' paper, or partly on customers' and partly on their own paper. When customers' paper is taken to the bank and approved, the bank makes an advance to the customer within the line of credit, and generally not exceeding the customers' paper handed in. The paper is discounted, as it is said, and proceeds placed to the credit of the merchant's account, and when it becomes due, unless paid by the customer, the merchant is expected to retire it. It is charged back to his account. If there are funds to his credit the balance is lessened by so much, if not the account is overdrawn. If at any time the merchant desires to obtain the paper so under discount,

whether current or past due, he gives his banker a cheque on his account for the amount thereof, and is then said to retire it. As between the banker and the merchant, the bank looks to and relies on the merchant to protect the paper, and only in event of the merchant's inability to do so, does the bank take any trouble to collect from the customer. It is not, as understood between the parties, a dealing between the bank and the customer whereby the bank takes the customer as its debtor, and the merchant as his surety, but a dealing between the bank and the merchant, in which the merchant is the debtor, and the customer's paper is pledged as security for the debt.

As to this however, as I have said, we have no evidence, and I will not assume what is the agreement in this case, so as to invalidate what would be otherwise a valid transaction.

In *Grant's Law of Banking*, 4th ed., p. 145, it is stated that "Bills may be paid in under circumstances furnishing evidence of a transfer of the property in them from the customer" (of the bank) "to the banker; that is a question of fact to be determined by a jury."

So far as that fact is found in this case, the finding is adverse to the defendant.

If we had to yield to the objection that the mortgage did not state the consideration truly, it would have been necessary to consider whether in any way the defendants could distinguish this case from *Hamilton v. Harrison*, 46 U. C. R. 127, where it was held that the erroneous statement of the consideration did not avoid the mortgage as a matter of law, but was a circumstance for the jury to consider when deciding the issue of fraud or no fraud.

It is clear that as between Osgoode and the plaintiff it was well understood and agreed that the plaintiff should retire the draft from the bank, as the chattel mortgage extended the time for its payment from the 19th of November, 1883, to the 13th of April, 1884, and it was in fact taken up or retired by the plaintiff when it became due.

In my opinion the judgment moved against is right, and the motion fails.

It will therefore be dismissed, with costs.

CAMERON, C. J., and GALT, J., concurred.

Motion dismissed.

[COMMON PLEAS DIVISION.]

McCLURE v. KREUTEZIGER.

Sale of goods—Acceptance—Quantum meruit.

The defendant purchased from the plaintiff a car load of "No. 1 Green Hoops" to be delivered at the railway station. On their arrival at the station they were removed by the defendant to his own place, and some of the hoops used by him, but merely, as he said, for the purpose of testing them. He then wrote to the plaintiff that he was astonished at his sending dry and rotten hoops for first class green hoops, and if he, defendant, had seen them before they were at his place he would not have touched them: that there were less in the car than the number stated by the plaintiff: that he enclosed a bill which was the amount he intended to pay, and not a cent more, because they were not worth that: and if the plaintiff would accept the amount offered to let the defendant know by return mail, and he would remit. In answer, the plaintiff, through his solicitor, threatened a suit, when the defendant replied that if plaintiff would not accept this he might go on and sue. *Held*, there was evidence to go to the jury of an acceptance of the hoops, and an agreement to pay on a *quantum meruit*.

THIS was an action arising out of a sale by the plaintiff to the defendant of a car load of "No. 1 Green Hoops," at \$3.90 per thousand, to be delivered at the Waterloo station of the Grand Trunk Railway.

The cause was tried before Burton, J. A., and a jury, at Sarnia, at the Spring Assizes of 1884.

It was admitted that the hoops were not in accordance with the contract, but it was contended that there was an acceptance of them by the defendant, and an agreement to pay on a *quantum meruit*. The defendant wrote offering to pay \$1.95 per thousand.

The learned Judge ruled that there was evidence to go the jury of an acceptance of the hoops, and an agreement to pay on a *quantum meruit*; and he left the case to the jury.

The jury found that there was such acceptance, and assessed the value of the hoops at \$2.50 per thousand, amounting in all to \$153.70.

The learned Judge accordingly entered the verdict for the plaintiff, with the amount of damages as assessed; but only allowed the plaintiff County Court costs, less the expenses of witnesses called for the purpose of shewing that the goods answered the contract; and he allowed to the defendant the difference between Superior and County Court costs, and the costs of those witnesses called by him exclusively as to the above.

In Easter Sittings, May 19, 1884, *E. P. Clement*, (of Berlin,) obtained an order *nisi* to set aside the verdict entered for the plaintiff, and to enter a verdict for the defendant, or for a new trial.

During the same sittings, June 6, 1884, *E. P. Clement*, supported the motion. The defendant was entitled to a reasonable user of the hoops for the purpose of testing them, and what he did only amounted to a reasonable user. The letter written by the defendant to the plaintiff did not amount to an acceptance of the hoops and an agreement to pay on a *quantum meruit*. The fair construction is, that the goods were not of the character ordered, and did not answer the contract, and the defendant so notifies the plaintiff. The defendant did not offer to accept them under the contract; but he said, if the plaintiff would let him have them at the reduced price he offered, he would take them, otherwise he insisted on standing on his rights and rejecting them as not coming within the contract. The learned Judge at the trial should have ruled, as a matter of law, whether there was a reasonable user, and also should have construed the letter himself, and the case should not have been left to the jury. He referred to *Lucy v. Mouflet*, 5 H. & N. 229; *Benjamin on Sales*, 4th Am. ed., secs. 912, 1350.

Bethune, Q. C., contra. The case was properly left to the jury and could not have been withdrawn from them. Whether there was a reasonable user was a question for the jury; and so also as to the acceptance. It was a question for the jury to say whether, under the circumstances, there was an acceptance or not. The case relied on by the defendant supports the plaintiff's contention.

June 26, 1884. CAMERON, C. J.—On the argument I was of opinion that the defendant's rule would have to be discharged, but reserved judgment in order to consider the case of *Lucy v. Mouflet*, 5 H. & N. 229, cited by Mr. Clement as an authority that strongly supported his contention, that there was no evidence that could properly be submitted to the jury of such an acceptance or dealing with the hoop-poles by the defendant as entitled the plaintiff to recover on a *quantum meruit*, it being clear that the poles delivered did not answer the description the defendant agreed to buy.

An examination of that case, so far from shewing there was no case to go to the jury, it is an authority to shew that the learned Judge would have done wrong if he had withdrawn the case from the jury, and nonsuited the plaintiff.

In that case it was held that the following letter, written by the defendant to the plaintiff, and the using of about twenty gallons of the cider, did not amount to an acceptance of a hogshead of cider that the plaintiff had sold to the defendant:

"SIR,—I think it best to inform you, that I have this day tapped the hogshead of cider that I bought of you, and find it quite a different article to the sample you shewed to me. It is quite flat and I fear perfectly unsaleable. The little I have sold as yet has been complained of in every case, and should this continue I shall be obliged to return it to you."

There was other correspondence not important to be considered. After writing the letter the defendant went on trying the cider till he had sold about twenty gallons, when he wrote to plaintiff to remove the cider, and offered to pay for what he had used. The plaintiff sued, and the

case was tried before the County Court Judge, who found that when the cider was sent from the plaintiff's it was good draught cider, in all probability equal to sample, but when it arrived in London it was flat and bad: and that by the contract the cider was to be delivered in London. He also found a sum of £1, paid into Court was more than the value of the twenty gallons used by the defendant, and that twenty gallons were more than enough to test whether the cider was equal to sample; and he thought, but for the letter, that the defendant so accepted the bulk as to make himself liable for the price. But he thought the plaintiff, not having answered the letter, acquiesced in the defendant's keeping and trying to sell the bulk, so as not, by so doing, accepting it, so as to enable the plaintiff to maintain the action. He found for the defendant, but reserved leave to the plaintiff to move to enter a verdict for £4.10, the contract price of the cider, less the £1 paid into Court. The plaintiff moved accordingly, and the Court held there was, by silence, an acquiescence on the plaintiff's part in the defendant making a further trial of the cider.

Bramwell, B., thought the construction of the letter was for the jury; and Channell, B., was of opinion a Judge would have been warranted in leaving it to the jury to say whether the plaintiff had acquiesced in the proposal of the defendant.

In the present case there was evidence of the defendant having removed from the station, the place of delivery, and used some of the hoops, and of his having written the following letter:

"DEAR SIR,—I received the car hoops which I bought from you the 23rd August as No. 1 green hoops. I was astonished when I saw the hoops, and don't know what to think of you to undertake yourself and ship such dry and rotten stuff for first-class green hoops. If I had seen the hoops before they were here I would have never touched them. You were stating in your letter of August the 3rd that there were 73,000 in the car, but my teamster counted 71,400, and so did the coopers. I have enclosed a bill which is the amount I intend to pay, and not a cent more, because they are not worth that, and would never

buy another car of same quality for that money shewn on bill. If you will accept this, let me know by return of mail, and I will remit."

There is no rejection of the hoops here, nor any intimation that the defendant would not accept or keep them, but only an intimation that they were not worth the contract price, and the defendant would not pay more than he offered, because they were not worth more.

Placing the most favourable construction for the defendant on the decision in *Lucy v. Mouflet*, it would be, that by acquiescence the plaintiff had agreed impliedly to accept the defendant's offer. But the plaintiff did not acquiesce. He immediately, through a solicitor, threatened suit, and the defendant, instead of at once repudiating all liability, replied, "If Mr. McClure is not going to take what I offered on the 10th instant, you will have to go on, for I will stand the Court."

There was thus the fact that the defendant had used some of the poles, and these letters to go to the jury, from which to find whether or not the defendant had determined to keep the poles, and only to pay for them what they were worth, as he had a right to do, or had refused to receive them. The poles were, by the contract, to be delivered at the railway station, and although a removal from the station to the defendant's own place would not necessarily constitute an acceptance of them, still it could not be withdrawn from the jury as a circumstance to be considered in arriving at a decision.

The jury found that in removing the poles to the mill, and dealing with them there, the defendant did more than was necessary to test their quality, and they found the value to be \$2.50 per thousand, or fifty-five cents more than the defendant offered to pay, amounting in all to \$40.15.

Unless there was some clear miscarriage or misdirection at the trial, which led to a misleading of the jury as to the legal rights of the parties under the circumstances, a new trial to enable the defendant to avoid the payment of \$40.15 more than he thought the poles were worth, could not be granted, and the doing so would in all proba-

bility result more injuriously to the defendant, considering the very favourable disposition the learned Judge at the trial made of the costs, than allowing the verdict to stand.

I would add, there is no doubt a purchaser of goods is not bound to return them to the seller when they do not answer the requirements of the contract of sale and purchase. But he must, I think, shew not merely that he is dissatisfied with them, but that he rejects.

The language of all the Judges taking part in the decision of the case in *Grimoldby v. Wells*, L. R. 10 C. P. 391, at p. 393, shews that more should be said or done than the defendant did here to indicate he rejected the poles.

Lord Coleridge, C. J., at p. 393, indicated that the effect of the judgment of the House of Lords in *Couston v. Chapman*, L. R. 2 H. L. Sc. 250, was, "That some unequivocal act must be done by the purchaser if he means to insist on his right of rejection, to shew that he does so reject."

Brett, J., thus states his view of what is sufficient for a purchaser to do to shew his rejection, at p. 395: "There are several modes in which he may reject them," (the goods), "some of which are pointed out by Lord Chelmsford, in *Couston v. Chapman*, in the passage which was cited from his judgment, and which, in my opinion, is to be read not as if cumulative, but as if alternative. He may, in fact, return them, or offer to return them; but it is sufficient, I think, and the more usual course is, to signify his rejection of them by stating that the goods are not according to contract, and they are at the vendor's risk. No particular form is essential; it is sufficient if he does any unequivocal act shewing that he rejects them."

The evidence in this case did not shew an unequivocal rejection of the goods, but simply a complaint that they were not in accordance with the contract, and a declaration that the defendant would not pay for them more than a specified sum.

GALT, J., concurred.

ROSE, J., was not present at the argument, and took no part in the judgment.

Order discharged.

[COMMON PLEAS DIVISION.]

TUCKETT V. EATON.

Issue of execution and seizure of goods after payment of debt—Malice—Trespass—Division Courts—R. S. O. ch. 47 sec. 160—Excessive damages.

The defendant having recovered a judgment against the plaintiff in the Division Court at Toronto, a transcript was ordered to be sent to another Division Court at Unionville, but by some mistake in the Division Court office it was not sent until after the debt had been paid, and the clerk of the Toronto Court endorsed on it a direction to the clerk of the other Court to issue execution and remit the money to him when made. The plaintiff's goods having been seized under this execution, he sued the defendant for having wrongfully and maliciously and without reasonable or probable cause caused the same to be issued and the plaintiff's goods to be seized thereunder. The defendant had never interfered or given any directions beyond instructing the suit to be brought.

Held, that the plaintiff could not recover: that it was his duty to protect himself by seeing that the clerk of the Division Court was notified of payment of the debt, and there was therefore no malfeasance or omission on defendant's part.

Held, also, that the defendant was not liable in trespass, for he had not authorized the direction by the clerk to issue execution, which was no part of the clerk's duty; and *Seemle*, that neither could he have been responsible if his attorney had directed it, after the suit had been settled.

Quere, under R. S. O. ch. 47 sec. 160, whether a person whose goods have been seized under Division Court process, can have any further relief than the restoration of his goods.

Held, also, that the damages given were under the facts, set out below, grossly excessive.

THE plaintiff, a merchant carrying on business in the Village of Markham, brought this action against the defendant, a merchant doing business in the City of Toronto, alleging, in his statement of claim, that the plaintiff, during the months of August and September, 1883, was holding an auction sale of his goods at his store in the Village of Markham, which he had advertised extensively and at great expense: that while he was so carrying on the auction, on or about the 22nd day of August, 1883, the defendant wrongfully and maliciously, without any probable cause for so doing, caused an execution to be issued against the plaintiff out of the Tenth Division Court of the County of York, and caused the same to be placed in the hands of a bailiff of the said Court, and caused the

said bailiff to make a seizure of the plaintiff's goods and merchandize thereunder: that the claim upon which the said execution was issued had several weeks prior to such issue been fully paid and satisfied by the plaintiff: that the issue of the execution and seizure by the bailiff of the plaintiff's goods put a stop to the plaintiff's auction sale, and caused other creditors of the plaintiff to take alarm and press for immediate payment, and to bring actions on their claims against the plaintiff, to his great loss, damage, and injury. And the plaintiff claimed \$2,000.

The cause was tried before Armour, J., and a jury, at Toronto, at the Winter Assizes of 1884.

The defendant, by his statement of defence, denied the truth of the plaintiff's allegations, and alleged that he was not guilty as in the plaintiff's statement of claim alleged.

From the plaintiff's evidence it appeared that he had been sued by the defendant in the Tenth Division Court of the County of York on a promissory note for \$177.60, on which judgment was recovered on the 12th day of July, 1883: that in addition to this claim the defendant had another claim against the plaintiff on a promissory note for \$154, which had been sued in the said Division Court, on the 26th July, 1883, the first Court thereafter being the 11th September, 1883: that in July, or before the summons in the second suit was served, the plaintiff, by different payments, paid Mr. Emerson Coatsworth, of the firm of Rose, Macdonald, Merritt, & Coatsworth, solicitors for the defendant, the amount of the first claim: that on the 22nd August, 1883, just before the hour of commencing the auction sale on that evening, a bailiff went to the plaintiff, informed him of the execution, and said he would have to seize. The plaintiff described what then took place as follows: "I told him I had paid it. Well, he said, he would have to seize. He went down to the end of the counter, where there were two or three piles of ready-made clothing, and he seized that in a lump. He said, 'I take all that on the end of the counter.' I took stock the next day. He seized \$1,984 worth of ready-made clothing.

He asked me about what was the amount there, and I said, at an estimate, probably \$1,600, I was not prepared to give more than a guess at it; but I took the precaution next morning, to find exactly what was there. The auctioneer was not there when the seizure was made.

* * That lot of clothing was the chief part of my stock that I was selling * * It was tweed goods and worsted that I was selling. They were just on the eve of getting out of season. They were summer goods. I told the bailiff I had paid the claim. I did more, I shewed him the promissory note which represented the claim I was sued on. It was the first time I was ever seized on, and I was at a loss what to do. 'Well,' he said, 'if you have paid this money, I do not want you to pay it again; but I have no alternative but seize.' Well, I permitted him to seize. 'Well,' he said, 'can you give any bonds that the clothing will be delivered to me when I want it.' I said, 'yes.' I named one most prominent man there, Mr. James Robinson. He said, 'I will take Mr. Robinson.' We went up to Mr. Robinson's building together, and Mr. Robinson consented to go security for the delivery of the clothing when he called for it, and we gave the bond, and the bailiff left. The execution still remains against me as far as I know. The clothing is there to answer the bond. It has not been discharged. About a month after I saw the bailiff on the street accidentally, and I said, Mr. Stewart, 'What about this matter with Eaton.' He said, 'I do not know. I understand the money has been paid, but they have not instructed me to do anything.' 'Well,' I said, 'shall I go on selling the clothing.' He said, 'I can tell you nothing. They have given me no instructions. I cannot tell you anything.' He said it appeared the money had been paid."

As to the injury done him, the plaintiff said, "The damage done to me in the first place is the loss of advertising the auction. I intended to continue the auction as long as I could get it kept up. It began on the 6th of the month, and I had considerable clothing and stock then. I suppose I had sold as much as was seized on. My sale was about half

through. The goods have lain there. I have failed to realize from this what I was depending on for my fall payments, which was a considerable amount, and to keep faith with all I was indebted to. In place of which it has upset me in that respect, and caused me to get behind, and I found a general change afterwards in those I had dealt with. If I had been allowed to go on I would have realized upon this \$1,900 worth of goods. These goods being tied up left me short. People sued me. I was sued by six or seven firms. Without doubt I would have been able to meet these payments without suit if I had been able to realize this. I am perfectly solvent. I presume it did me considerable injury in my connection with Mr. James Robinson. He had often, in years gone by, assisted me when I wanted it, and since then he has not offered to assist me when he knew I needed it. It shook my credit with all my creditors, I believe, for I had no trouble before in arranging any renewal, and I attribute the difference all to this. I have continued to keep my store open. This lot of \$1,900 was summer clothing. I cannot sell these again till next summer. I also had to have a certain amount of summer clothing to keep up my sale, and supply customers. Well, seeing that there was no return of these goods to me, I was getting calls for certain lines, and I had to buy a few lines of fresh goods to keep up the regular trade, which I should not have had to do if these goods had been at my command. I treated it as if these goods were liable to be called on at any time, and they were subject to Mr. Robinson's bond. I asked Mr. Robinson repeatedly if he had got his bond back, and if I was safe in going on. He said he had not got the bond back; and I said I would not touch anything that was not legally mine. I feel my credit thoroughly ruined now.'

These statements were made on the plaintiff's examination-in-chief, and were admitted, without objection to the admissibility of any of them, as evidence.

The bond given by the plaintiff and Robinson, his surety, was conditioned to be void if the plaintiff and Robinson

paid on or before the first day of September, 1883, to the bailiff the sum of \$143.14, with interest, together with costs of suit; or, in default of payment, delivered to the bailiff the property seized at such time as the bailiff should require them at the plaintiff's shop.

On cross-examination the plaintiff admitted that he did not pay the note for \$177.60 at maturity: that he made the first payment on the 16th July: that he was not sure whether he called on Mr. Coatsworth on the 10th July, and agreed to pay \$20 by the 15th July. He remembered something about an arrangement to the effect that if an extension was made to the 15th of July he would pay \$50. He said he was written to about the claim, but didn't know that he had been written to several times: that he had not seen Mr. Eaton, but a person in Mr. Eaton's office: that he went from Mr. Eaton's office to Mr. Coatsworth's: that he was to pay \$50 on the 15th July, and did not pay the \$50 then, but paid \$40 on the 16th, and didn't pay anything on the 20th July, and that he paid the balance on the 26th or 27th of July: that he may have paid the balance in two payments: would not dispute paying the \$60 on the 24th July: did not recollect Mr. Coatsworth telling him judgment had been entered against him till his (plaintiff's) solicitor told him so: did not see Mr. Eaton after the seizure, before the suit, nor Mr. Coatsworth, and did not recollect writing a letter to them. In answer to the question:—"Why didn't you go to the defendant or Mr. Coatsworth to get the execution out of the way?" he answered:—"I didn't know that I had a right to."

Edmund H. Duggan, Clerk of the Division Court, gave evidence to the effect that the suit was commenced on 23rd June, and summons served on the 26th June, and judgment signed on the 12th July: that on the 26th July the plaintiff gave credit for \$40, and instructed an execution to issue for the balance, as he understood from his clerk: that on the 21st of August (improperly noted in the evidence 21st July) he issued a transcript of the judgment to the Division Court at Unionville: that he did not know how

he came to do it then, but his clerk was away, and he thought the instructions must have been overlooked, and so issued it: that nothing else appeared in the docket: that there was no return of the writ.

In cross-examination he stated that \$3 had been paid as a deposit on entering the suit, and that the balance of his fees, 54 cents, was paid by Mr. Coatsworth on the 3rd of August. He could not say whether any instructions were given on the 3rd August. If fresh instructions had been given they would be in the instruction book. There were none entered. He received a letter from defendant's solicitors on 1st September. In reply to the question:—"Were you instructed at that time by the defendant's solicitors to stop this execution?" he said:—"The expression used is: 'We suppose it will be wise to notify the bailiff so that he will not act further upon it; our client cannot be answerable.'"

Charles P. Medland swore he was Deputy Clerk of the Tenth Division Court, under Mr. Duggan: that he was in charge when Mr. Duggan was away: that he received instructions to issue a transcript, on the 26th of July, for the full amount of judgment, less \$40, which Mr. Coatsworth gave credit for on that day. He did not remember from whom he received instructions. At that time there were two clerks coming from Mr. Coatsworth's office—a brother of Mr. Coatsworth, and a Mr. Bentley. The instructions were to issue the transcript to John Stephenson, Unionville. The transcript was issued. After the issue of the transcript he had no control over the execution.

In cross-examination, he said, the instructions to issue the transcript were received on the 26th July, and he could not say why it was not issued till the 21st of August. He supposed it was overlooked. He might have been busy at the time. He received balance of costs, 54 cents, on the 3rd August; that did not recall why transcript was not issued. He knew then it had not been issued. He was not aware that he received any instructions between the 3rd and 21st of August. He did not remember any, He did

not issue the transcript himself. Mr. Duggan issued it. A person going through the instruction book can tell when instructions are complied with. They are scratched out.

John Stephenson, Clerk of the Division Court at Unionville, produced the transcript. Issued an execution on it to James Stewart, bailiff of the Court, on the day of receipt, 22nd of August. It has not yet been returned. The execution was for the amount of transcript, and the costs of the execution.

James Stewart, the bailiff, swore, that he made a seizure on the plaintiff's goods, on the 22nd of August, on the execution which he produced for the debt, and his costs added, which had not been paid: that he took a bond under the seizure: that the plaintiff told him the debt was paid: that he went away the next day, and on his return enquired of Stephenson whether he had got word that the execution was paid, and he said no. He asked him again within a week, if he got any word the debt was paid, and he said, no. About a week after that he came to town, and went to Mr. Eaton's. He was away, and witness learned from a young man in defendant's office that Rose, Macdonald, Merritt, & Coatsworth were his lawyers. He went and saw Mr. Rose, who told him the execution was withdrawn, and the debt paid. Mr. Rose said he never wrote (?) the execution at all. A few days after he found Mr. Duggan, and asked him about it. He wrote on the back of the execution: Stay the execution; debt is paid. Those were all the instructions the witness received from that day to this, and he had the execution still.

At the foot of the transcript of judgment there is, partly written and partly printed, the following request: "J. Stephenson, Clerk of the Division Court, Unionville. Be pleased to issue execution on the above transcript, and remit money when made by post-office order, or otherwise, to Edmund Henry Duggan, Toronto. E. Coatsworth, per E. H. D."

At the close of the plaintiff's case Mr. Shepley, for defendant, submitted that there was no evidence to go to the

jury, as it was necessary for the plaintiff to prove malice on the part of the defendant, and there was no evidence of any fact from which malice could be inferred, and no evidence to connect the defendant with what had been done, and that trespass could not be maintained till the process was set aside. He cited *Huffer v. Allen*, L. R. 2 Ex. 15. There was no specific evidence to connect the defendant with the trespass.

The learned Judge overruled the objections, and directed that the case should be submitted to the jury.

The defendant then re-called James Stewart, who said he seized a quantity of ready-made clothing, could hardly say what there was. There was a nice little pile lying on the counter. He did not look at the value, because when the plaintiff said the debt was paid he took very little more interest in it. There was another pile between three and four feet long, and about three feet high, piled up on the cross counter. It was on the long counter the goods were seized. The size of the pile seized was about a foot and a half high, and a little bit extended at the end of the counter. He did not tell him he had seized about \$1,600 worth.

Emerson Coatsworth, solicitor of the defendant, swore that before the suit was entered he had several interviews with the plaintiff, who was unable to pay the claim. On the 10th July it was agreed if \$50 were paid by the 15th July the defendant would wait till the 20th, and then if the plaintiff paid \$50 the defendant would wait again. He made the next payment on the 16th July, \$40. That was the first payment after suit was entered. The plaintiff sent an unmarked cheque for \$60 about a week after that. He wrote him that they could not accept it, that he must return the money or a marked cheque. He returned him the cheque. Then, on the 26th July, he got a letter from him, asking for more time. Letter dated 25th July read. He wrote him he could not wait any longer, and ordered execution that day, which was the 26th July. The plaintiff came in on the following day, the 27th, and

paid \$75, and assured witness that the cheque, which he had before given, and then handed back, as witness believed, would be honored in a day or so, or in a few days, or if presented at once—had forgotten just when. However, that was taken, and there was a balance of \$6.12 struck then as being due on the claim. On that day he sent to the Court to stay execution. He sent his, witness's, brother, a clerk in the office at the time. He brought back a statement of the costs. Witness sent to pay these costs two or three days afterwards to close up the suit. The payment of the \$6.12 was made on the 1st August. During these proceedings he had no communication with the defendant, except in the first part of the suit, when instructed to press the matter. Had no communication after the payments were made with defendant, because immediately on these payments being made witness closed up the suit, and paid the defendant his money. The money was paid to them on 4th of August. The day the balance of the costs was paid to the clerk, a cheque was given to the defendant for \$167. He gave no instructions to the clerk after the balance was paid.

On cross-examination witness said: "I withdrew execution on 27th July. It was not a withdrawal, but a staying of proceedings for a few days. The instructions to the clerk were to stay execution. The entry in the books is: 'We to stay execution for a few days.' We did more than carry out the agreement—we stayed execution. If the cheque had been dishonored we would have ordered out execution again. We did not tell the Division Court clerk that it was subject to being paid. We were satisfied to pay our clients on the 4th of August. We were not satisfied to remit till the 6th of August, because the cheque did not pass through the bank till that time. If the cheque had not been paid we would have ordered execution out. We simply sent a message to the clerk to stay the execution, without saying anything definite. We gave no written instructions to the clerk afterwards. We heard there was an execution out. When Stewart called told him the execution had been paid.

Did not say whether it should be gone on with. Mr. Rose wrote to the clerk. Did not do anything more in it."

Charles E. Coatsworth swore he was a clerk in Rose, Macdonald & Co's. office, and said: "I was receiving instructions from my brother in this matter. In consequence of these instructions I went back to the Division Court Clerk and stayed execution, and then came back and entered it in the book. The entry is in my hand writing. The date of it is July 27th. It says: 'Attending Court; stayed execution.' I would not swear who it was I saw, but I think it was the Deputy Clerk."

On cross-examination he said: "I remember this particular suit itself. I do not remember having anything to do with another suit *Tuckett v. Eaton* (? *Eaton v. Tuckett*). That was the only one. I do not remember looking up the number in the procedure book when I was staying the execution, or giving instructions." To the Court: "I remember Mr. Tuckett coming in and paying my brother \$75, and then he told me to go over and stay the execution, and I went over. I could not say whom I saw, because I had been in several times that day. I did not see Mr. Duggan. Mr. Duggan was very seldom there. I think I saw Mr. Medland. I remember telling him to stay the execution. I do not remember the words I used to him. I could not say whether it was to stay for a few days or until further orders, or to stay absolutely. I gave no written instructions."

At the close of the defence Mr. Shepley renewed his objections, submitting the evidence failed to connect the defendant with the issue of the writ, and it was clear that there was no malice, and no facts from which it could be inferred.

The learned Judge said: "This whole case turns now upon what took place after the transcript was issued. There is no doubt the defendant was answerable for issuing that transcript. That was done by his authority, and he received the money. The money was received under it, and paid under it. The order was issued under Eaton's authority. Then

your case must rest entirely on young Mr. Coatsworth's evidence. It must turn on whether the execution was absolutely stayed or not."

The jury found that the execution was not stayed: that it was issued by the authority of the defendant, and maliciously: that the defendant was guilty of the trespass and grievances laid to his charge; and they assessed the damages, by reason of the wrongful seizure of the plaintiff's goods, at \$500; and the damage to the plaintiff's credit, by reason of the wrongful and malicious seizure, at \$1,000.

The learned Judge recorded the verdict for \$1,500, and directed judgment to be entered against the defendant for that amount, with full costs of suit.

During Hilary sittings, February 14, 1884, *Shepley* obtained an order *nisi* calling upon the plaintiff to shew cause why the verdict of the jury, and the judgment directed to be entered thereon, should not be set aside, upon substantially the same grounds taken by him at the trial; and on the further ground that the damages were grossly excessive.

During Easter sittings, June 3 1884, *Shepley* supported the order. By the amendment made at the trial a count for trespass was added. Upon that count the plaintiff should have been nonsuited, because under the circumstances disclosed trespass would not lie. The act complained of was not the act of the defendant, but of the Division Court Clerk, and there was no evidence to connect the defendant with it in any way: *Freeman v. Rosher*, 13 Q. B. 780; *Willson v. Tummon*, 1 D. & L. 513; *Ashby v. White*, 1 Sm. L. C., 8th ed., p. 301. Upon the other count the plaintiff cannot succeed for want of proof of malice. The act complained of was a mere nonfeasance for which defendant cannot be held liable. The plaintiff having allowed the Division Court suit to proceed against him until it was ripe for judgment, and until in fact judgment had been ordered, had only himself to blame, if, after paying the claim, he did not take the proper steps to have the execution stayed. It was no part of defendant's duty to do

this: *Scheibel v. Fairbairn*, 1 B. & P. 388; *DeMedina v. Grove*, 10 Q. B. 152; *Huffer v. Allen*, L. R. 2 Ex. 15; *Smith v. Sidney*, 39 L. J. N. S. Q. B. 144; *Tebbutt v. Hall*, 1 C. & K. 280; *Ault v. Armstrong*, 12 U. C. R. 385; *Young v. Daniell*, 21 U. C. R. 443; *Ventris v. Brown*, 22 C. P. 345. The damages were grossly excessive. [CAMERON, C. J. It is not necessary for you to argue this point. As at present advised, we think there will have to be a new trial on this ground; but the more serious question is, as to whether there must not be a nonsuit on the other grounds argued.]

Osler, Q. C., contra. The form of the action is not material. The question here is, can the plaintiff recover on the facts proved? We allege that after the judgment recovered against the plaintiff had been fully paid and satisfied, the defendant caused an execution to be issued and the plaintiff's goods seized. The plaintiff alleged and proved that the issue of the execution under the circumstances was improper and unlawful, and it is not necessary to allege and prove malice. The act here constituted a misfeasance and not a non-feasance; and the authorities shew that where misfeasance is set up, it is not necessary to prove malice: *Addison* on Torts, 5th ed., c. 30; and this is the doctrine laid down in *Scheibel v. Fairbairn*, 1 B. & P. 386, the case principally relied on by the other side. But, even assuming that it is essential to prove malice, there was evidence of malice given. It is a question for the jury whether there was malice or not, and they have expressly found there was malice. As to the damages, they cannot be complained of. This was the first execution ever issued against the plaintiff. It is proved that the auction sale was stopped, and the sale of the goods prevented.

June 26, 1884. CAMERON, J.—There is no question that the plaintiff's verdict must be set aside; for, adopting the language of the order *nisi*, it is grossly excessive, and it is impossible to conceive how any twelve men, possessed of ordinary common sense, could find that, assuming the defendant to be responsible for the acts

complained of, the plaintiff suffered fifteen hundred dollars, or fifteen hundred cents, damages thereby. It is barely possible that the jury may have laboured under some strange misapprehension as to the facts, and may have thought the goods were disposed of, or were still under the control of the defendant's execution; for I observe, unless the short-hand reporter has made a very grave mistake, that the learned Judge stated, in reply to the defendant's motion for a nonsuit, that the transcript was issued "by his," the defendant's "authority, and he received the money. The money was received under it, and was paid under it."

It appears to me the reporter must have made a mistake in ascribing this language to the learned Judge, who is justly esteemed for his very clear perception of facts and sound judgment; and the evidence undoubtedly disclosed that no money was made under the transcript of judgment, or the execution thereon issued: that the transcript was not issued till the 21st day of August, and the plaintiff had been wholly paid by his solicitors upon the 6th of August—two weeks before the transcript was issued. If, therefore, the learned Judge is correctly reported, the jury may have been misled by his remarks.

But the more important question involved is, was there any case disclosed by the evidence, against the defendant, to go to the jury, either by reason of his having authorized a direct trespass, or of his having been guilty of suing out the transcript of judgment maliciously, and causing the plaintiff's goods to be seized after he had satisfied the debt.

The question of malice is one of fact, and is usually one for the consideration of the jury, but before the jury can be asked to express an opinion, the Court must determine whether, upon the evidence, there is anything shewn from which an inference of malice may be drawn. It is not because the plaintiff has suffered an injury that the action can be maintained. He must go further and shew, where the injury is caused by the execution of a legal process, that such execution has been put in motion by a mali-

cious, that is a bad or improper motive, with the object of causing injury to the person or property of the person against whom it is put in force, or with the object of gaining some personal benefit or advantage to the actor or some one else.

In *Scheibel v. Fairbairn*, 1 B. & P. 388, cited by Mr. Shepley, it was determined that an action will not lie for neglecting to prevent the arrest of a debtor on a *capias ad respondendum* after he had paid the debt. It appeared that the plaintiff, on the 8th of October, went to the house of the defendant and paid the debt in question: that on the next morning, at 20 minutes past ten, he was arrested in his own house, and carried to that of the officer. Nothing was said at the time the money was paid concerning the writ. The defendant only lived a short distance from the sheriff's office, and could easily have sent to countermand the execution of the writ. A countermand was in fact given by letter, but it did not arrive at the sheriff's office till the morning of the 9th, when all the officers were gone out with their warrants. The learned Judge held at the trial that the countermand was not given within a reasonable time, in which view the Court afterwards concurred. The declaration alleged the payment of the debt, and averred that it thereupon became the duty of the defendant to have forthwith countermanded the arrest of the plaintiff upon the writ, yet well knowing the premises, but not regarding his duty in that behalf, he did not countermand the same, but wrongfully neglected so to do. The defendant moved, in arrest of judgment.

In giving judgment upon the motion Eyre, C. J., said, at p. 391: "It is agreed that this is an action of the first impression, and it strikes me at present that it cannot be supported. It is not founded on any injury wilfully committed by defendant, but on a mere nonfeasance. The writ having been regularly sued out, a tender was made, which it is clear the defendants might have refused to receive. However, they think proper to accept it. Upon this, was it not

the business of the plaintiff to enquire whether any writ had been sued out, and offering to pay whatever costs were incurred thereby, to desire a countermand, which he might take to the sheriff? The plaintiff ought not to have trusted to a countermand of the writ by the defendants, but to have obtained it for himself by his own diligence: it appears that the plaintiff has been the occasion of all the inconvenience which he has suffered; for, having made it necessary in the first place, by his neglect to pay a just debt, that the writ should be sued out, he did not prevent its consequences by taking the countermand into his own hands. If the cause had proceeded, the offer to satisfy the debt could not have been pleaded as a tender. Without the ingredient of malice this action cannot be supported, and, I think, in a case new as this is, and where malfeasance and non-feasance are attempted to be confounded, the Court ought to incline against it. Had the defendants refused or wilfully neglected to countermand the writ, it might have afforded evidence on an averment of malice by which such an action might have been sustained; but without such averment the Court should be extremely cautious of subjecting a party to damages for mere nonfeasance."

The other Judges who took part in the judgment were Buller, Heath, and Rooke. The last concurring in the judgment added, "An action of this kind cannot be supported unless malice be alleged and proved."

This case was approved and followed in our Court of Queen's Bench in a similar case of *McIntosh v. Stephens*, 9 U. C. R. 235. The head note to which is: "After bailable *ca. re.* sued out and placed in the sheriff's hands, defendant settled the suit in full; he was afterwards taken on the writ, and thereupon brought an action for malicious arrest. *Held* not maintainable, without proof of actual malice."

The authority of these cases does not appear to have been since questioned.

I can see no substantial difference in principle between these two cases and the present. The judgment was properly recovered; the transcript was ordered before the debt was

paid, and it was the duty of the plaintiff to protect himself by seeing that the clerk of the Division Court was notified of the payment of the debt. The defendant was wholly ignorant himself of the proceedings, and, with the exception of instructing the suit to be brought, which he had a right to do, there was no interference shewn to have taken place by him in any shape or way with the proceedings. If then in law there is no duty cast upon him to notify the clerk of the payment of the debt, it cannot be inferred that in omitting to perform an act which was not imposed upon him as an obligation, he could be guilty of actionable wrong based on malice in consequence of such omission.

Moreover there is room to infer from section 160, R. S. O. ch. 47, that the only relief a party whose goods have been seized under process of the Division Court, under such circumstances as this case presents, is the having his goods released and restored to him.

The language of the clause is as follows:—"If the party against whom an execution has been awarded pays or tenders to the clerk or bailiff of the Division Court, out of which the execution issued, before an actual sale of the goods and chattels, such sum of money as aforesaid, or such part thereof as the party in whose favor the execution has been awarded agrees to accept in full of his debt, together with the fees to be levied, the execution shall thereupon be superseded, and the goods be released and restored to such party."

The payment here was made to the defendant's solicitor, and so was not a payment strictly within the terms of the clause, but it was one within the spirit of it, and if the defendant had refused to release the goods voluntarily the execution might have been superseded under the clause.

I think then the action fails, treated as one based upon a malicious malfeasance or nonfeasance.

I am of opinion it fails also treated as an action of trespass. To connect the defendant with the seizure of the plaintiff's goods it is necessary to shew that such seizure was the direct act of the defendant, or

an act authorized by him, either directly or indirectly, through an agent having authority from him. An attorney has authority to issue execution for a client, and his direction to the sheriff or officer, whose duty it is to enforce the execution, will bind his client.

In this case it is not pretended the defendant or his attorney gave any direction to Stewart, the bailiff, to seize the plaintiff's goods. The evidence goes no further, taken in its strongest aspect against the defendant, than to shew that on the 26th day of July, a clerk of the defendant's attorneys gave instructions to Mr. Duggan, the Clerk of the Division Court in Toronto, to issue a transcript of the judgment to the Division Court at Unionville. The memorandum in the instruction book is simply: "Eaton v. Tuckett. Transcript." The transcript issued by Mr. Duggan has at the bottom thereof the following direction: "To J. Stephenson, Esq., Clerk of the Division Court, Unionville. Be pleased to issue execution on the above transcript, and remit money, when made, by post office order, or otherwise, to Edmund Henry Duggan, Toronto. E. Coatsworth, per E. H. D." The transcript bears date the 21st August, 1883. The debt was fully paid by the defendant's attorneys to him on the 6th August, so that, as far as that particular suit is concerned, the agency of Mr. Coatsworth was at an end; and if the direction to issue execution on the 21st August had been signed by Mr. Coatsworth, and not by Mr. Duggan, it would be difficult to see how the defendant could be bound by Mr. Coatsworth's act. If he can be so bound, he would be equally liable if the Division Court Clerk, Mr. Duggan, had issued the transcript and given the direction to issue the execution five years after the payment of the debt and receipt of the instructions to issue the transcript.

The Division Court Act does not make it any part of the duty of any Clerk of the Court to give directions with the transcript of judgment to the Clerk of the Court to which the same has been transmitted to issue execution.

The transmission of judgment from one Division Court-

to another is provided for by section 161 of R. S. O. ch. 47 ; and this section enacts, after transfer :—"All proceedings may be taken for enforcing and collecting the judgment in the last mentioned Division Court by the officers thereof that could be had or taken for the like purpose upon judgments recovered in any Division Court." And by section 156 it is provided that the party, in whose favour judgment is given, may sue out execution against the goods and chattels of the party in default, and thereupon the clerk, at the request of the party prosecuting the order (judgment), shall issue under the seal of the Court a *fiери facias* to one of the bailiffs of the Court, who, by virtue thereof, shall levy by distress and sale of the goods and chattels of such party such sum of money and costs, (together with interest thereon from the date of the entry of judgment,) as have been so ordered, and remain due, and shall pay the same over to the clerk.

It would seem to be clear under these provisions that without the request at the foot of the transcript of the judgment in evidence in this case, the Clerk, Stephenson, would have had no authority or right to issue the execution under which the bailiff, Stewart, seized the plaintiff's goods; and certainly, where it sought to impose what might be, and if the jury's estimate of it be correct was a serious liability on a person in the situation of the defendant, the evidence ought not to leave it in doubt whether the act was committed by him or some one authorized by him, and the evidence wholly fails to shew that more than issue of the transcript was ordered, which, without more, would have hurt no one.

I am therefore of opinion there was no evidence to be submitted to the jury of any authorization or ratification by the defendant of the act of seizure of the plaintiff's goods by the bailiff, Stewart. If the only question was : "Did Mr. Coatsworth direct the Division Court Clerk to stay execution" ? that could not be withdrawn from the jury, though, to my mind, the evidence of such direction is far stronger than that against it. There is direct

evidence of the order to stay. Against it, there is only the inference that may be drawn from the fact, that there appears to be no entry of such order in the instruction book, an inference that can only be drawn upon the assumption that there is never any neglect of duty in the office of the Division Court, an assumption that cannot be adopted in this case, for the omission to issue the transcript of judgment before the 21st August, unless the order to do so was countermanded, was a clear neglect of duty, and if the order was countermanded, it was a worse neglect of duty to have issued the transcript on the 21st August.

The order *nisi* must be made absolute to dismiss the plaintiff's action, with costs.

GALT, J., concurred.

ROSE, J., having been engaged in the case while at the bar, took no part in the judgment.

Order absolute.

[COMMON PLEAS DIVISION.]

SUTHERLAND V. COX ET AL.

Brokers—Agreement to carry stock on margin—Failure to purchase stock—Custom and usage.

The defendants assumed a contract made by the plaintiff with one F., a broker, under which F. was to purchase and carry for the plaintiff 500 shares of Federal Bank stock on payment by plaintiff of a percentage on the purchase money of the stock called "margin," and the plaintiff was to keep up his margins in case of a fall in the value of the stock; and, to enable F. to carry the stock, a time loan was also arranged for the balance of the purchase money, on which the plaintiff was to pay 8 per cent. It appeared that no stock had ever been purchased for the plaintiff, and the defendants never had, and did not carry any stock for the plaintiff, but were, as it is termed, "short" on this stock.

Held, that the defendants having failed to carry out the agreement to carry the stock for the plaintiff, the plaintiff was entitled to recover back from the defendants the money paid as margin, interest, &c., as money had and received to the plaintiff's use.

The defendants set up an alleged custom and usage of the stock exchange, that where a broker is employed to purchase stock for a customer on margin he is at liberty to be himself the seller and nominal pledgee of the stock, and to charge a commission as if a real sale had been effected, although at the time he may not be owner of a single share; and that the broker fulfills his obligation, if he is prepared at any time to deliver the stock to his customer.

Held, that no such custom could prevail; for not only would it be directly opposed to the law which regulates the transactions between broker and employer, but it has this further defect, that it substitutes the personal liability of perhaps an insolvent broker for the real security of the stock.

THIS was an action brought by Robert Sutherland against the firm of Cox & Worts, composed of E. S. Cox and F. Worts, carrying on business as stock brokers and money lenders in the City of Toronto.

The cause was tried at Toronto, at the Spring Assizes of 1884, before Hagarty, C. J., without a jury, who gave judgment in favour of the defendants for \$807, without costs.

The pleadings and evidence are fully set out in the judgment of Galt, J.

The following is the judgment of the learned Chief Justice at the trial.

HAGARTY, C. J.—Farley was carrying the 500 shares for plaintiff on a ten per cent. margin. The plaintiff left for England in April, and was told that Farley had obtained a loan on stock from Moat of Montreal at 8 per cent. to

1st December, and he was told by Farley that at any time he wanted to sell the interest should cease. Farley got into difficulties; and in July, in the plaintiff's absence, the defendants took over these shares for Farley, settling with him and crediting him with the interest at 8 per cent. to run against the plaintiff in any event to the 1st December.

I find on the evidence there was no such loan from Moat, or any one else. Moat and Farley settled all interest matters up to the middle of July.

I also find that the defendants dealt with Farley, believing that he had the right to charge the plaintiff the interest to 1st December. I do not think that defendants can set up any higher right against the plaintiff than Farley could set up; and I find that the plaintiff must be credited now with this interest as improperly charged against him.

I cannot see that any cause of action is established against the defendants beyond the right to recover back this interest. The defendants advising him not to sell in August, and that, if he did, he would still have to pay the interest to 1st December, does not, I think, give any cause of action, and I cannot hold that such advice was given in bad faith; nor do I understand why plaintiff did not then at once repudiate any absolute liability to pay this interest, sale or no sale, up to 1st December. Nor am I able to fix any legal liability on the defendants for the sale on the 15th October. They had the apparent right to sell, and they had the advice of Mr. J. Leys, the plaintiff's friend, that selling would be the wisest course.

I think the defendants were always in a position to obtain 500 shares of Federal whenever they required them to satisfy the plaintiff or any other person.

I am unable to accede to the plaintiff's views as to the peculiar liabilities of the pledgee of chattels. I treat the case as one to be decided on the ordinary rules and customs regulating the trafficking and speculating in stocks. The defendants were, as it is called, carrying the plaintiff's stock, he looking for a rise; and I find that the defendants were at any time ready and able to give him his stock or sell it for him if he so desired.

I think the justice of the case requires me to allow to the plaintiff \$2,226, the amount of interest, as I find, improperly charged to the plaintiff by the defendants.

I find the defendants entitled on their counter-claim to a balance of \$807.

I do not think it a case for interest on either of these sums.

I think that as the upshot is, that a balance is coming to the defendants on their set-off or counter-claim I cannot give the plaintiff his costs. Had he merely sued for the over-charged interest I would I think give them to him.

I direct judgment for the defendants for the balance of \$807, without costs, and award execution therefor, staying to fifth day of May sittings.

At the Easter sittings, *D. E. Thomson* moved, on notice, to set aside the judgment entered for the defendants, and to enter judgment for the plaintiff for \$4,693.

During the same sittings, June 9, 1884, *D. E. Thomson* and *D. Henderson* supported the motion. The plaintiff's intention, as the evidence shews, was to purchase in good faith the 500 shares of Federal Bank stock, he paying a margin and his broker being instructed to obtain the balance of the purchase money by a pledge of the stock. Farley, who was acting as the plaintiff's broker in that transaction, being about to retire from that business, the plaintiff through his agents instructed the defendants to take over the stock, and carry it as the plaintiff's brokers. The defendants, instead of taking over the stock, undertook with Farley to deliver the stock to the plaintiff on the plaintiff's demand. They thus substituted the defendants' liability to deliver the stock for the stock itself. The defendants, however, represented to the plaintiff that they had taken over the stock and assumed the loan alleged to exist thereon of \$75,807.54, concealing from him what the true facts were; and when the plaintiff desired the defendants to sell the stock, they precluded the plaintiff from doing so by the knowingly false statement that the stock was then subject to a pledge for an advance of \$75,807.54, bearing interest at 8 per cent. until the 1st December, and that under the terms of the pledge the advance could not be paid off and the stock released without such interest being paid in advance up to the 1st of December. This was a knowingly false statement made by the defendants, with the intention that the plaintiff should believe it to be true and should act upon it, and the plaintiff believing

it to be true did act upon it, and refrained from calling upon the defendants to effect a sale of the stock at the then market price; otherwise the plaintiff would have been entitled to receive from the defendants on such sale at the then current rate the sum of \$4,600, for which sum he is now entitled to a verdict: *Watson v. Poulson*, 15 Jur. 1111, at p. 1112; *Polhill v. Walter*, 3 B. & Ad. 114, 123; *Milne v. Marwood*, 15 C. B. 778, *Pasley v. Freeman*, 3 T. R. 51; *Addison* on Torts, 4th ed., pp. 835-837. There is no evidence in support of the alleged custom referred to in defendants' statement of defence. Such a custom, even if it had been shewn to exist among brokers, would not be binding upon the plaintiff, who was not aware of its existence, and who was not shewn to have contracted with reference to it: *Lewis* on Stocks, p. 33; *Duncan v. Hill*, L. R. 8 Ex. 242; *Evans v. Waln*, 71 Penn. R. 69; *Sweeting v. Pearce*, 9 C. B. N. S. 534; *Shaw v. Spencer*, 100 Mass. 382; *Day v. Holmes*, 103 Mass. 306. Such a custom as that set up by the defendants, even if supported by evidence, would be illegal, and cannot be allowed to prevail: *Robinson v. Mollett*, L. R. 7 H. L. 802; *Taussig v. Hart*, 58 N. Y. 425; *Lewis* on Stocks, p. 23; *Jones* on Pledges, ed. of 1883, secs. 510-11; *Redfield* on Carriers and Bailees, ed. of 1869, p. 526, sec. 659; *Levy v. Loeb*, 89 N. Y. 386; *Ex p. Dennison*, 3 Ves. 552; *Dykers v. Allen*, 7 Hill 497; *Markham v. Jaudon*, 41 N. Y. (2 Hand) 235, 239; *DosPassos* on Stock Brokers, pp. 102, 147, 150; *Wigglesworth v. Dallison*, 1 Sm. L. C. 8th ed., 594; *Brown v. Bryne*, 3 E. & B. 703; *Humfrey v. Dale*, 7 E. & B. 266, S. C., E. B. & E. 1004. Under the most favourable construction for the defendants this whole transaction was fictitious, except the receipt by the defendants from Farley of the sum of \$3,442.46, representing the amount then alleged by Farley to be due to the plaintiff in respect of moneys paid by him on account of margin on the 500 shares of stock. This amount Farley states in his evidence he paid to the defendants, and that evidence is uncontradicted. That was the plaintiff's money;

it was received by the defendants, and they are liable for it as money received for the plaintiff's use: *Bullen & Leake*, 3rd ed. pp. 44-48; *Hambly v. Trott*, 1 Cowp. 371; *Lindon v. Hooper*, 1 Cowp. 414; *Litt v. Martindale*, 18 C. B. 314. The plaintiff cannot be liable for interest, as he never undertook to pay interest except on the assumption that an actual loan had been procured on his stock. No loan was ever procured, consequently there can be no liability.

J. K. Kerr, Q.C., and Lash, Q.C., contra. The only rights the plaintiff has are those that arise under the agreement made between him and Farley. The plaintiff's sole object in entering into the agreement, and dealing with the stock, was that of speculation. He never intended buying or paying for the stock, or taking a transfer of it, or that Farley should do so for him. All that Farley undertook to do, and all that it was intended he should do, was to account to the plaintiff for the stock, or the market value of it, whenever the plaintiff might call upon him to do so; and to protect Farley, the margin was deposited with him. What the defendants undertook to do was to assume Farley's position under the agreement, that is, to account for the stock or its market value; and the learned Judge has expressly found that the defendants were always in a position to obtain the stock whenever required to do so by the plaintiff, or to sell it for him, if so ordered. It must also be considered that when the defendants took over Farley's business, there was no stock held for the plaintiff. The defendants took over Farley's business as a whole, and the \$3,000 paid to the defendants was on the whole business, and not as the margin deposited by the plaintiff with Farley. If the agreement was that the stock should be purchased and held for the plaintiff, then the plaintiff would be entitled to recover damages for the failure to do so, but there can be no damages as the stock fell in value. If the plaintiff is in a position either to adopt or repudiate the contract made by defendants with Farley, he must do so as a whole. He cannot adopt part and repudi-

ate part. If he repudiates then there is no privity between the plaintiff and the defendants, and therefore there is no cause of action; but if he adopts then he must adopt the whole agreement, and the liability must depend upon its terms. The obligation of the defendants was to assume Farley's liability to procure for the plaintiff the stock or pay its market value at the time when plaintiff might demand it, and the plaintiff's agreement was not only to pay the margins, but also to pay 8 per cent. on the \$75,867.74, until the 1st December. The plaintiff failed to carry out his agreement. The defendants were therefore entitled to do as they did, and to refuse to continue under liability to the plaintiff; but the agreement was not thereby cancelled *ab initio*, but the rights of the parties acquired under it continued, and the defendants had the right to retain all moneys received by them and to call on the plaintiff to make good the amount claimed by the defendants, by their counterclaim, and which the learned Judge at the trial held they were entitled to. The judgment of the learned Judge is right, and should be upheld. They referred to *DosPassos* on Stock Brokers, p. 180; *LeCroy v. Eastman*, 10 Mod. 499; *White v. Smith*, 54 N. Y. 522; *Jones* on Pledges, secs. 503, 509.

June 26, 1884 GALT, J.—This case is one of great public importance, involving the mode in which what may be called "stock jobbing" is carried on in this Province. I therefore set out at length the statement of claim and the defence.

Statement of Claim:

1. The plaintiff is a merchant, residing in the City of Toronto, and the defendants are stock-brokers and money-lenders, carrying on such business under the firm name of Cox & Worts, in the said City of Toronto.

2. On, and prior to the 20th day of July, 1883, one W. W. Farley was carrying on business as stock-broker in Toronto, under the name of W. W. Farley & Co.; and, as such broker, under instructions of the plaintiff, purchased for the plaintiff 500 shares of capital stock of the Federal

Bank of Canada, a banking institution doing business under the Banking Acts of Canada.

3. The plaintiff, as the said Farley well knew, purchased the said stock for the purpose of realising profits on the same, by the rise in the market price of the same. The plaintiff not being provided with funds of his own to pay the full amount of the purchase money for the said shares, instructed the said Farley to obtain a loan on the same, the object being to keep the said shares out of the market, and hold the same, thereby making the same scarce in the market, and hold for a profit to be obtained from the rise in the market price of the said shares.

4. The said Farley did obtain such loan, the defendants becoming the pledgees of such stock upon certain terms then agreed upon, and with knowledge of the purpose to which the stock was purchased and loan effected by the plaintiff.

5. While the defendants were the holders of the said shares, and without any default being made by the plaintiff as such pledgor, the defendants wrongfully and tortiously, and without the assent or knowledge of the plaintiff, sold and disposed of the said shares or a portion thereof, and otherwise dealt in same from time to time, with the object and intention of thereby lowering the price of the said shares in the market, to the detriment of the plaintiff, as the defendants well knew, and defeating the very object for which the plaintiff had purchased the said shares, and for which they were pledged to the defendants.

6. The plaintiff charges that by the said dealings with the said stock the defendants rigged the market, to the detriment and damage of the plaintiff, thereby causing him large losses, by depriving him of anticipated profits on the said shares.

7. The plaintiff further charges that the defendants subsequently rendered an account to the plaintiff, by which they claim to have sold the said shares at a much less sum than the sum at which the shares were pledged to them, and that the plaintiff was indebted to them in large sums of money.

8. The plaintiff charges that the said pretended sale or sales last mentioned were wholly fictitious, and that the defendants sold the said shares at a much larger price than represented in their account sales to the plaintiff.

9. The plaintiff has frequently demanded from the defendants an account of their said dealings and transactions

with the said shares, which they have refused to furnish ; but the plaintiff submits that he is entitled to a discovery of the defendants' books of account, shewing the transactions in the said shares, and an account of their said dealings therewith, and charges that such account will shew large sums of money to be due from the defendants to him.

10. The plaintiff also claims damages for such wrongful sales, for the loss of profits to him by reason of the defendants' dealings with the said shares, by which the market price of same was lowered to the detriment of the plaintiff.

AMENDED STATEMENT OF CLAIM.

And for a further cause of action the plaintiff says:

11. On or about the 20th day of July, 1883, the defendants representing that they held, and undertaking to hold for the plaintiff, as his brokers, for reward to the defendants, 500 shares of the capital stock of the Federal Bank of Canada, received thereon from the plaintiff's agent for the use of the plaintiff, as a margin or deposit to secure the defendants from loss in carrying the said stock for the plaintiff, as the brokers or agents of the plaintiff as aforesaid, the sum of \$3,500.00.

12. The defendants never acquired the said shares, nor did they ever hold the same for the plaintiff, and the representations made to that effect by the defendants were false and untrue, yet the defendants have not paid over to the plaintiff the said sum of \$3,500.00 or any part thereof, and the same with interest remains due by the defendants to the plaintiff.

The plaintiff claims upon this cause of action \$4,000.

And for a further cause of action the plaintiff says:

13. The defendants, acting as the shareholders and agents of the plaintiff, held for him 500 shares of the capital stock of the Federal Bank of Canada.

14. The plaintiff requested the defendants, as his share brokers and agents, for reward to them, to sell and dispose of the said shares upon a time and occasion when the market price of the said shares was \$161 per share.

15. The defendants then represented to the plaintiff that they had, for his benefit and advantage and as his agents, arranged a time loan upon the said 500 shares of stock, and that such loan could not be paid off without great loss to the plaintiff until the 1st day of December, 1883, and

that in consequence thereof the said shares could not, prior to that date, be sold to advantage by the plaintiff.

16. That, relying solely upon the truth of the defendants' said statements, and upon the request of the defendants, the plaintiff withdrew his said instructions, and did not sell the said shares, and the plaintiff lost the market for the said shares at the said price, and the same fell in value shortly thereafter, and were afterwards sold at a loss to the plaintiff, compared with the said price of \$161 per share, of \$11 per share, besides the loss of interest upon the price thereof in the meantime.

17. The representations made by the defendants, set forth in the fifteenth paragraph hereof, were wholly false and untrue, to the knowledge of the defendants. No such loan had ever been made by the defendants upon such shares of the plaintiff; and the said representations were so made by the defendants for their own purpose and advantage, and to avoid being called upon to produce and deliver the said shares, which they had therefore wrongfully converted to their own use.

And the plaintiff claims on this cause of action, \$6,000.

Statement of defence—counter-claim:

1. The defendants deny all the allegations in the plaintiff's statement of claim.

2. The defendants say that the said Farley was a stock broker, doing business in Toronto for a number of years similar to the business carried on by the defendants, and the plaintiff was aware of the mode in which the business of stock brokers in said city was carried on, and of the custom and practice regulating the same: that for a long time prior to and at the times of the transactions between the plaintiff and the said Farley, and between the said Farley and the defendants, and between the plaintiff and the defendants, as hereinafter mentioned, a reasonable and well understood custom and practice prevailed among the stock brokers of the city and their customers respecting transactions in bank stocks of the nature of those in question in this action, with reference to which custom all contracts and dealings with brokers for the pledge, sale, or purchase of bank stocks were made and carried out, and with reference to which the contracts and dealings between the plaintiff and the said Farley, and between the said Farley and the defendants, and between the plaintiff and the defendants, hereinafter mentioned, were made and car-

ried out; and by such custom and practice, the broker who purchased on margin for a customer shares in bank stocks, or with whom bank stocks were pledged as security for advances made by him thereon, was, in the absence of any special contract or agreement to the contrary, entitled to treat said shares in the nature of bank bills or money, and to deal therewith as to him might seem best, he being bound at any time to return to the customer, or the pledgor thereof, as the case may be, on demand and on payment of the advances and interest, if any, an equal number of shares of stock in the same bank; and the said broker having the right to demand at any time from the customer or pledgor, as the case may be, repayment of such advances, and to deliver or return to him on such repayment being made an equal number of shares, as aforesaid; and in default of such repayment to discharge himself from the obligation to return such equal number of shares by crediting the customer or pledgor with the then market price thereof, and accounting to the customer or pledgor for the balance, if any, in his favour, or requiring the customer or pledgor to pay the balance, if any, against him.

3. The defendants say that the transactions between the plaintiff and said Farley, and between the said Farley and the defendants, and between the plaintiff and the defendants, as hereinbefore mentioned, were made with reference to and were controlled by the said custom and practice, and there was no special contract or agreement between them to the contrary.

4. That after the plaintiff had employed the said Farley to purchase for him the said shares of bank stock, and after the said Farley had contracted for the purchase thereof, and before any transactions between the defendants and the said Farley in respect thereof had taken place, the said Farley sold or otherwise disposed of and parted with said shares, but remained liable to return to the plaintiff on demand, and on repayment of the advances procured on said shares by said Farley for the plaintiff, an equal number of shares of stock in the same bank, and the plaintiff remained liable to be called upon by the said Farley for repayment of the said advances, and interest, and to receive such equal number of shares, and to pay to said Farley any balance in his favour upon the taking of accounts as aforesaid.

5. That after the said Farley had so disposed of or parted with said shares, he became desirous of retiring from

the stock broking business, and requested the defendants to take over from him the said liability of the plaintiff, and to assume his said liability to the plaintiff, with respect to the delivery of said number of shares to the plaintiff. The defendants agreed to do so, and did so, and notified the plaintiff thereof, and the plaintiff assented to their so doing, and thereupon the plaintiff and the defendants occupied towards each other the relations of customer and broker, and the defendants had the right thereafter at any time to demand from the plaintiff repayment of the advances procured by the said Farley upon the said stock, and to deliver to him upon such repayment being made an equal number of shares, as aforesaid; and on default of such repayment, to discharge themselves from the liability to return such equal number of shares by crediting the plaintiff with the then market price thereof, and accounting to the plaintiff for the balance, if any, in his favour, or requiring the plaintiff to pay the balance, if any, against him.

6. That thereafter the defendants notified the plaintiff that they required him to repay the said advances and receive the said number of shares of stock, but the plaintiff made default, and thereupon the defendants became entitled to discharge themselves from their said obligation to deliver said stock to the plaintiff; and, for the purpose of fixing the market price thereof, the defendants offered said number of shares of bank stock for sale upon the Toronto Stock Exchange, and thereby the market price thereof was fixed: that upon an account being taken of the market price of said stock at the time of such default, and of the moneys payable by the plaintiff to the defendants in respect of said stock, it was found that the plaintiff was indebted to the defendants in a balance amounting to the sum of \$3,033.78, which sum thereupon became due and payable by the plaintiff to the defendants, which sum has not been paid.

And by way of counter-claim, the defendants repeat the foregoing statements, and they claim from the plaintiff payment of the said sum of \$3,033.78, and interest thereon from the 16th day of October, A. D. 1883.

Statement of defence to amended statement of claim:

1. The defendants deny all the allegations in the plaintiff's amended statement of claim.

2. The defendants plead in answer to the said amended statement of claim the statements contained in their original statement of defence and counter claim.

3. The defendants further say that the causes of action sued upon by the plaintiff in his amended statement of claim are inconsistent, and they claim the same benefit from this objection as if they had formally demurred to said amended statement or claim.

Issue.

The facts of the case may be briefly stated as follows: The plaintiff being desirous of speculating in the stock of the Federal Bank, had become the purchaser through a firm of stock-brokers of 200 shares, on which he had deposited with them a portion of the purchase money under the name of "margin." He had also made further purchases to the extent of 300 shares additional through a broker named Farley, in the same way; and by arrangement between all parties Farley received from the first firm the margin held by them and assumed the position of broker and customer, as respects the whole 500 shares.

I may here state what I understand to be the manner in which these transactions are conducted. A person desirous of speculating in shares, in expectation of their advancing in price, instructs a broker to purchase say 100 shares in his name, and at the same time deposits with him such portion of the purchase money as may be agreed on between them. This is called "margin." And at the same time arranges with him for payment of the unpaid purchase money, the shares remaining pledged to the person advancing the money as security, that is to say, suppose 100 shares should represent \$10,000 par value, and the margin agreed on to be 10 per cent, the purchaser would pay the broker \$1,000, and the 100 shares purchased would remain as security in the hands of the broker for the remaining \$9,000, or be pledged by him with the person who might agree to lend the money to pay the vendor. There is thus a real security to the broker or pledgee.

It appears further from the evidence, that, in the absence of any special arrangement to the contrary, the pledgee of the shares has the right at any time to call on the pledgor to pay up the unpaid portion of the purchase money, irres-

pective of the "margin;" and in order to guard against this it is usual to arrange a "time loan" at a fixed rate of interest, that is to say, the pledgee of the stock agrees not to call on the purchasers to pay the balance due until a named day, the purchaser in the meantime to pay a fixed rate of interest; and also to guard the lender from loss, by at all times keeping good his "margin," that is, by adding to it, if the price falls.

It also appears that when such arrangement for a "time loan" has been made the pledgor may sell his shares at any time, and the pledgee may stipulate that the interest shall be paid up to the named day, although in the meantime the pledgor may have sold his shares and redeemed the pledge.

Let us apply the foregoing to the dealings of the plaintiff with Farley before we connect the defendants. Farley was carrying 500 shares of Federal Bank for the plaintiff, on which a large sum had been deposited as "margin." The plaintiff was about proceeding to England, and was desirous of making an arrangement with him so as to prevent these shares being sold while he was absent.

The plaintiff in his evidence states: "Farley told me he would make a "time loan on 500 shares until the 1st of December at eight per cent. He said I would have to pay interest at eight per cent." Q. "What were the terms of the loan?" A. "Time loan at eight per cent. until the 1st of December. I asked him if that would interfere with me in selling the stock at any time during my absence, and that interest would cease at once, and he said I could sell the stock at once, at any time, and the interest would cease at once.

Farley in his evidence says: "I made arrangements with Sutherland before he went to England that I could carry this stock he had until 1st of December. Then he went to England."

There is a difference between the plaintiff's evidence and Farley's, as to whether interest was to cease on the sale of the shares, or whether it was payable under all circum-

stances up to 1st December. This, however, is of no consequence. All I am considering at present is what was the undisputed position of these parties at the time when Sutherland went to England, and Farley held these shares as his broker, and before the defendants had anything to do with the plaintiff or his affairs. It is then beyond dispute the plaintiff considered that Farley held 500 shares on his account, and that he had negotiated a loan on them at eight per cent. to be paid on 1st December. It is also equally plain that Farley stated this to be the case.

The plaintiff left the country, and some short time afterwards Farley being, for reasons of his own, desirous of giving up his business as a broker, with the consent of plaintiff's agent, transferred the plaintiff's stock transaction to the defendants.

As no one was present on behalf of the plaintiff, the first intimation his agent received was by a letter addressed to T. G. Blackstock, on 20th July, 1883, as follows :

"Dear Sir :

"We have received from Messrs. W. W. Farley & Co., 500 shares Federal Bank, account R. W. Sutherland, and paid them \$75,807¹⁰/₁₀₀, on which we charge interest at eight per cent. until December 1st, as per arrangement."

"Yours very truly,

"COX & WORTS."

As I have already said no person was present on behalf of the plaintiff when this arrangement was made, so we must rely on the evidence given by the defendant Cox, and the witness Farley. I will refer to that of the latter in the first place.

Farley, called as a witness by the defendants, says: "This particular 500 shares of Sutherland's I made arrangements with Sutherland before he went to England, that I would carry this stock he had until the first December. Then he went to England. I made up my mind some time after to give up the stockbroking business, and go into the business I am in now. His solicitors, Beatty & Chadwick, sent me a letter to deliver these 500 shares to Cox & Worts,

so I had this stock down with Mr. Moat, and I had a time loan with him, and I had to go down to Montreal and see Mr. Moat, and I stated to him how it was. I asked him to release this loan; he did not want to do it. Somewhere about the 9th or 10th of July, having received Mr. Beatty's letter, he stated then, if I wished to pay the interest up to the 15th of July, he would allow me to release it, so I came up and I gave the stock to Messrs. Cox & Worts, the amount I had. Moat's clerk told me that if I paid the interest up to the 15th of July, he would allow me to release the stock, so I came up here and having received instructions to give over the stock to Cox & Worts, I gave over what stock Moat had to Cox & Worts, and the \$3,000 I gave to Cox after the Sutherland matter was on the general account." Q. "What was the arrangement with Cox with regard to this stock. Had you a specified 500 shares to hand over to him?" A. "I thought I had until the present time; my book-keeper was attending to this; I had given him all the stock I had. Mr. Cox took over all my customers, and any stock I was short of. I had to sell stock to realize margin. Any stock I was short of I told him to buy in for me." Q. "So he was pledged to buy in the 500 shares." A. I suppose so. I did not know that until to-day sir."

This evidence was given after Cox had been examined, and given the testimony to which I will presently refer.

After some further examination he is asked. "You at all events satisfied him (Cox) on the margin on this stock?" "Certainly I did; at all events I gave him full margin in Sutherland's case. I protected Sutherland's rights to the end, and all the rest of my clients."

Cox in his evidence, which for the present I will confine entirely to this dealing with Farley, says: Q. "What was your first connection with the 500 shares in question here?" A. "The first connection in July." Q. "In what way was it brought about?" A. "In conversation with Mr. Farley." Q. "What was the arrangement you made with Mr. Farley about it?" A. "Among other accounts, I was to take over this of Mr.

Sutherland's." Q. "In taking over that account what did you undertake in connection with it, what was the arrangement and bargain—What was the arrangement with Mr. Farley?" A. "I credited him with the amount as he had given me a memo. of the amount due by Mr. Sutherland. I credited Mr. Farley with that, and debited Mr. Farley with 158½ on the other side of the account." Q. "That is to say it was debit and credit with Mr. Farley?" A. "Yes." Q. "You charged Mr. Farley \$79,250 being 500 shares of Federal at 158½, on the 18th of July?" A. "Yes." Q. "And you have credited him there with 500 shares at what?" A. "With the amount due by Mr. Sutherland." Q. "It was \$75,807.54?" A. "That is the amount."

In order to make this plain, it must be born in mind that Cox was taking over a large number of transactions from Farley, and Farley was paying the difference between himself and his respective customers to Cox; so in this particular case Farley was liable to Sutherland at the then price of the stock in the sum of \$79,250, and Sutherland was indebted to Farley, or whoever might be the pledgee of his shares, in the sum of \$75,807.54, the difference between these sums being the margin deposited by him with Farley, and which Farley paid over to Cox, viz. \$3,443.

In the plaintiff's evidence he states he had paid a much larger sum than this to Farley, but the present defendants have nothing whatever to do with that. If they are liable in this case for money had and received, or on any other ground, they are responsible only for their own transactions, and not for any thing done by Farley.

This arrangement having been made, the defendants wrote the letter to Blackstock: "We have received from Messrs. W. W. Farley & Co., 500 shares Federal Bank, account R. W. Sutherland, and paid them \$75,807.54, on which we charge interest at eight per cent. until December 1st, as per agreement."

It is plain from the evidence of Cox himself he had not received 500 shares from Farley & Co., all he had actually received was the difference already mentioned, of \$3,443, and

had nominally assumed to be the purchaser of 500 shares. He states, however, in explanation of this that, although the transaction was "debit and credit with Farley," we were long with Moat at that time 600 or 700 shares.' The meaning of this is that he was the owner of 500 or 600 shares which had been pledged with a broker in Montreal of the name of Moat, to what amount he does not state. In fact he not only had not received any stock from Farley, but he had no shares; all he had was a right to call on Moat to release to him 600 or 700 shares on payment of any claim Moat might have against him. It is also very plain that the real transaction was never made known to the plaintiff or his agents.

It is beyond dispute the defendants had received from Farley \$3,443, on account of the plaintiff, which was to be applied in a particular way, that is to say, to remain in their hands as security to indemnify them against any loss they might sustain in consequences of the selling price of 500 shares being less than \$75,407, the plaintiff being at liberty to call upon them at any time to transfer 500 shares to him on payment of that sum.

When we refer to Moat's evidence it does not appear the defendants had any shares at all in his hands in the month of July. His evidence is confined to the months of August and September, and on the 28th of August all they had was 150 shares. It is, however, useless to discuss the question whether at that time they had or had not 500 shares, for before they undertook to sell what they represented were the plaintiff's shares, the defendant Cox admits, (page 59,) that in the month of August when plaintiff consulted him as to the advisability of selling his shares, "that they were short in the neighbourhood of 3,500," that is to say they had sold 3,500 shares more than they possessed.

Irrespective of this the evidence satisfies me that Cox never had 500 shares of Federal Bank in the hands of Mr. Moat to represent the shares he professed to take over from Farley; and what was more, that he never in-

tended to have them; that his intention was to be short on this transaction. I have already referred to the negotiation between the plaintiff respecting the time loan at eight per cent. until the 1st December. Now on referring to Farley's evidence, we find in answer to the question, "There were 500 shares of stock, and in that way it was to be carried?" he replies, "I wanted to place Mr. Sutherland so that he would not be bothered by having the stock delivered on to him, and knowing Cox was "short," I thought best to protect Sutherland by giving him the loan the same as I had myself, the interest was to be the same as I had at the time, eight per cent. I spoke to Mr. Cox afterwards—after handing over the whole of the business to him. I told him I had been at a good deal of expense going to Montreal, Moat transferring the stock to me and charging me brokerage, and transferring it back. Now says I, you are "short" of nearly every thing I transferred to you, I think you might divide the interest with me at all events." The meaning of this is very plain; it is simply that as Cox was "short" in the stock he should agree to divide the interest which his employers on their sales were liable to pay with Farley, because he (Cox) would receive the interest on the unpaid balance of fictitious sales. Cox, in his evidence, in reference to the plaintiff's 500 shares, at page 55 of his evidence says: "Did you assume any loan?" A. "No we did not." Q. "Your letter of 10th August is not true then?" A. "Quite true. We do not say we assumed any loan, that assumption might refer to the terms; that is all." Q. "Was there a loan on that 500 shares?" A. "We did not assume any loan." Q. "Assuming his loan on same at eight per cent. until the 1st December. These are the words?" A. "That is correct." Then in answer to his lordship, "We had nothing to do with Moat at all." Q. "You divided up with Farley, did you not, the interest to be carried on that, up to the 1st December?" A. "Yes." Q. "And in your account with Mr. Farley you take credit to yourself for \$1,129.85 interest on 500 Federal?" A. "The reverse of that, we credited him." Q. "And you charge up in this account

double that amount?" A. "Yes." Q. "For interest which you have not paid on any specific loan." Q. "What interest did you pay Moat on any loan you had down there?" A. "During these months we never paid Moat more than six per cent. We did not pay him less than six. In the neighbourhood of 700 shares were held with Mr. Moat in July."

The transaction as sworn to by both these men, is that Farley applied to Cox to be allowed half the interest payable by the plaintiff on his shares, which interest was to be eight per cent. to 1st December, and that Cox actually allowed Farley no less a sum than \$1,129.85. Now if this had been a true purchase and sale, what would Cox have said to Farley when he was asked to pay him one half of the interest to be charged to the plaintiff. He would surely have said, I cannot do that for I am paying six per cent. to Mr. Moat,—(It must be borne in mind he had in a previous part of his evidence, to which I have referred, given the Court to understand that he had shares in Moat's hands to meet this transfer. "We were long with Moat at that time 600 or 700 shares,")—and if I gave you four per cent. I shall be a loser of two per cent., as all I am entitled to claim from Mr. Sutherland is eight per cent. It is therefore manifest that Farley knew, and Cox knew, it was only "debit and credit with Farley," and that Cox had no intention whatever of becoming the owner of 500 shares of Federal Bank shares on account of the plaintiff, but held himself liable to procure 500 shares for the plaintiff if he demanded them, but at the same time to demand payment of interest at eight per cent on \$75,807 on a loan which had never been made. The defendants therefore not having purchased 500 shares for the plaintiff, never could have sustained any loss in consequence of having done so, and are therefore bound to repay the sum received by them on his account with interest, amounting to the sum of \$3,632.

I have been considering the case simply on the question as to whether or not the plaintiff was entitled to recover on the claim for money had and received. But when the case was tried before the learned Chief Justice, the principal

discussion appears to have been on what may be called the custom of "The Stock Exchange" in dealings between brokers and their clients. The evidence is of a most startling character, and briefly amounts to this, that if a man in the position of the plaintiff being of opinion that any named stock is likely to increase in price, instructs a broker to purchase stock on his account, the broker is at liberty to be himself the seller and nominal pledgee of the stock, and to charge a commission as if a real sale had been made, although at the time the broker may not be the owner of a single share. It follows that the broker is not only buyer and seller, but places his interest in direct opposition to that of his employer, for if the price rises the broker is the loser, and if it falls the broker is the gainer. Such a mode of dealing is directly opposed to the law which regulates the transactions between broker and employer, even supposing the broker to be the actual owner of the stock. But the case is far worse, if, in a case like the present, the broker is what is termed "short" on the stock, namely, undertakes to sell what he does not possess. The so called custom is said to be that the broker fulfils his obligations, if he is prepared at any time to deliver the stock to his client; but such is not the law of the land, and, if there was no other objection it has this fatal defect, it substitutes the personal liability of perhaps an insolvent broker for the real security of the stock.

From the evidence given in the present case the defendants were, according to their own admission, 3,500 shares "short," equal in value at the then price of the shares, in August, say 160, to \$560,000, and according to the general custom they must have had in their hands about 35,000 of margin belonging to their clients, and charging them interest on upwards of \$500,000 without their customers having any security except their own personal responsibility. Such a custom is, to say the least of it, of such an extraordinary character that no person unacquainted with and agreeing expressly to be bound by it can or should be affected by it. The whole law of broker and client is so fully discussed in

the case of *Robinson v. Mollett*, in the House of Lords, 7 H. L. 802, including this question of custom, that it is unnecessary to do more than refer to it.

In our opinion no broker who makes a fictitious sale to his client; in other words, who is "short," can by any possibility be a gainer. If the stock rises he is responsible for the increase, for he could not allege there had been no sale; and on the other hand, if the stock fall, the customer would be entitled to a return of his margin, interest thereon, and commission paid, because in truth there had been no purchase.

The motion will be absolute to set aside the judgment, and to enter judgment in favor of plaintiff, for the sum of \$3,632, with costs.

ROSE, J.—I quite agree. It would have been a very unsatisfactory conclusion if we had been forced to award judgment to the defendants against the plaintiff on such a state of facts as here appears.

I illustrate the position thus:—A party goes to a land agent, and instructs him to purchase a property then subject to a large mortgage falling due within, say, six months. The equity of redemption or margin over the mortgage claim is, say, twenty per cent. There is a probability of a sharp advance in value, and to secure the advantage the purchase is directed. The agent receives the twenty per cent., and is to take full charge of the property and watch the interests of the client, it being understood that the client is not in a position to pay the mortgage except out of a sale of the property. At the expiry of the six months real estate has fallen in value, and the agent notifies his client that the property has been sold, and not realizing the mortgage indebtedness, he, the agent, has paid the deficiency *i. e.*, say \$500, and asks his client for such sum. Thereupon the client discovers that the purchase never was made: that the agent merely opened an account in his books with the matter, crediting the client with the twenty per cent, and debiting him with an amount equal to the

interest on the mortgage and the deficiency, also a commission for purchase and sale, holding himself liable to pay any profit that might possibly be coming to his client if the property should advance in value, thus substituting his personal responsibility for the security of the property.

To the demand by the client for a return of the twenty per cent, and interest thereon, what answer could the agent make? It seems to me none. Such a transaction would have been so clearly a fraud on the principal that immediate relief against the agent would be granted. The usual rule that a trustee dealing with trust property in such a way as to involve a breach of trust, renders himself liable to make good all possible loss, and to account for all possible profit, must apply. It would be no answer to say: "If I had bought the property and carried out your instructions the result would have been the same." A complete reply would be: "You substituted your personal responsibility for the security of the property, and placed yourself in such a position that it was against your interest that I should make a dollar of profit."

My brother Galt has most clearly pointed out how these principles apply to the case before us.

It is time that brokers should be made aware of their legal liability and responsibility towards their clients, and that they cannot, in addition to the ordinary and extraordinary results attendant upon stock transactions, subject their clients to the risk of the broker using his influence to prevent stock rising, or his client selling out at a time when a profit would be made, also to the risk of his broker not having the means to answer his call when a favourable turn of the market would lead him to give an order to realize.

I am glad that we are able to reach the conclusion at which we have arrived.

CAMERON, C. J., concurred.

Motion allowed.

[COMMON PLEAS DIVISION.]

THE COMMERCIAL NATIONAL BANK OF CHICAGO V.
CORCORAN.*Foreign corporation—Right to hold goods—Transfer of warehouse receipts—
Bills of Sale Act—Banking Act.*

C. & O. carrying on business in Chicago, in the State of Illinois, for the manufacture of mill machinery, &c., had certain machinery manufactured for them in Stratford, Ont., which was warehoused with M. & T., at Woodstock, Ont. C. & Co. being pressed by plaintiffs, their bankers in Chicago, for collateral security for two of their notes of \$5,000 each, discounted by the plaintiffs, endorsed over to the plaintiffs the warehouse receipts for these goods. At the maturity of the notes, C. & Co., not being in a position to retire them, in pursuance of an arrangement to that effect, the warehouse receipts were cancelled and new ones dated 12th October, 1883, were made out direct to the plaintiffs. On 3rd September, 1883, C. & Co. had made an assignment to a trustee in Chicago for the benefit of creditors. On 22nd November the defendant placed writs of execution in the sheriff's hands against C. & Co., under which these goods were seized. No fraudulent preference or intent was proved.

Held, that the plaintiff, a foreign corporation, could hold personal property in Ontario: that C. & Co., being residents of the State of Illinois, the transfer must be governed by the law of that State, according to which the transfer was valid and effectual: that, even if dealt with as subject to the law of Ontario, when C. & T. gave the warehouse receipts direct to the bank, they held the goods for the plaintiffs, and there was therefore a transfer of both property and possession in the goods to the plaintiffs, subject to the trustee's rights, if any; and the goods being in the hands of third parties and not of C. & Co., the Bills of Sale Act did not apply; and also that the Act as to banks and banking, and warehouse receipts, did not apply to the plaintiffs, a foreign corporation.

THIS was an interpleader issue. The trial took place at Stratford, at the Spring Assizes of 1884, before Wilson, C. J., without a jury, and judgment was given in favour of the plaintiffs.

The facts are fully set out in the judgment.

At the Easter Sittings the defendant moved on notice to set the judgment aside and enter judgment for defendants.

During the same sittings, May 30, 1884, *Idington*, Q. C., supported the motion, and referred to R. S. O. ch. 116, secs. 16, 17; *Cockburn v. Sylvester*, 1 App. R. 471; *Bank of British North America v. Clarkson*, 19 C. P.

182; *Milloy v. Kerr*, 43 U. C. R. 78, 3 App. R. 350, 8 Sup. Ct. R. 474; *Great Western Railway Co. v. Holyson*, 44 U. C. R. 187; *Todd v. Liverpool, London and Globe Ins. Co.* 20 C. P. 523; *May* on Fraudulent Conveyances, 88-9; *Bank of Montreal v. McTavish*, 13 Gr. 395; *Coates v. Joslin*, 12 Gr. 524; *Farina v. Home*, 16 M. & W. 119; *Benjamin* on Sales, 3rd Amer. ed., 405, sec. 816; *Scribner v. McLoren*, 2 O. R. 265; *Boyd v. Glass*, 5 App. R. 632; *Ancona v. Rogers*, 1 Ex. D. 285.

J. K. Kerr, Q. C., and *Bird* contra, referred to *Westlake* on *Private International Law*, 208-9, 245; *Bateman v. Service*, 6 App. Cas. 386; *Dicey's Law of Domicile*, 145; *Sill v. Worswick*, 1 H. Bl. 665, at p. 690; *Freke v. Lord Carbery*, L. R. 16 Eq. 461; *Green v. Lewis*, 26 U. C. R. 618, 625; *Jacob v. Credit Lyonnais London Agency*, 49 L. T. N. S. 39; *Chitty* on Contracts, 11th ed., 92; *McMaster v. Garland*, 8 App. R. 1; *Richardson v. Gray*, 29 U. C. R. 360; *May v. Security Loan and Savings Co.*, 45 U. C. R. 106, 110; *Burrill* on Assignments, 4th ed., p. 436; *Cloyes v. Chapman*, 27 C. P. 22; *Lebel v. Tucker*, L. R. 3 Q. B. 77; *Castrique v. Imrie*, L. R. 4 H. L. 414; *Wharton's Conflict of Laws*, 2nd ed., sec. 353; *Foote* on Private Int. Jurisprudence, p. 239; *Smith v. Merchants' Bank*, 8 App. R. 15, 8 Sup. Ct. R. 512; *Suter v. Merchants' Bank*, 24 Gr. 365; *Stuart v. Tremain*, 3 O. R. 190; *Segsworth v. Meriden Silver Plating Co.*, 3 O. R. 413.

June 26, 1884. ROSE, J.—There was much argument before us as to the law relating to banks and banking, warehouse receipts, and chattel mortgages. We think the case may be disposed of without considering these questions.

It appears that a firm of Chisolm Bros. & Gunn, carried on the business in Chicago and Minneapolis of manufacturing mill machinery, fitting up mills, &c. The firm consisted of Samuel S. Chisolm, W. P. Chisolm, and William F. Gunn. The firm had certain machinery manufactured for them in Stratford, Ontario, by The Thompson & Williams Manufacturing Company. This machinery was warehoused with a

firm named McDonald & Thompson, at Woodstock, Ont., Chisolm Bros. & Gunn being pressed by their bankers in Chicago, the plaintiffs, for collateral security for two notes of the firm under discount of \$5,000 each, endorsed over to the bank the warehouse receipts.

A legal gentleman, who gave evidence as to the law of the State of Illinois, stated that the transfer of the warehouse receipt transferred the property in the machines to the bank.

When the paper fell due, the bank spoke to Chisolm Bros. & Gunn about selling the machines, as the firm were not in a position to protect the paper. A delay was asked for, when the manager replied: "We will see. I think we had better take those warehouse receipts and have them changed into our own name." It was then arranged that W. P. Chisolm should go over on behalf of the bank to see if the machines were properly stored, and get them insured if necessary.

On the 10th of October, 1883, the cashier of the bank (the plaintiffs) wrote to Messrs. Bird & Martin, their solicitors at Woodstock, as follows: "I have given Mr. W. P. Chisolm five warehouse receipts signed by McDonald & Thompson, for mill machinery. We have held these as collateral security for a long time, and now think it best that the receipts should be made out in the name of the Commercial National Bank of Chicago. Please have this done, and deliver new receipts to Mr. Chisolm." Thereupon the first given receipts were handed back to McDonald & Thompson, who signed and delivered five receipts in favour of the bank.

These receipts are dated 12th October, 1883. Chisolm Bros. & Gunn made an assignment in Illinois for the benefit of their creditors, on the 3rd of September, 1883, and the defendant, on the 22nd of November, 1883, placed writs of execution in the hands of the sheriff of Oxford, who seized the goods in question.

It seems clear that the plaintiffs, although a foreign corporation, could hold personal property in Ontario. The law

is much discussed and collected in *Howe Machine Co. v. Walker*, 35 U. C. R. 37, where the right to bring actions to recover money, the proceeds of goods sold, and in some cases to bring actions on executory contracts, is recognized. It would follow that the right to hold personal property to enable foreign corporations to carry on trade, &c., must also be recognized. See *Westlake's Private International Law* ed., of 1880, p. 297, sec. 286 *et seq.*

No doubt the country in which a foreign corporation sought to transact business would recognize the limitations of its charter.

It seems also clear that personal property has no locality, and is subject to the law which governs the person of the owner. See *Westlake's Private International Law*, ch. 7. As the plaintiffs and Chisolm Bros. & Gunn were both resident in the State of Illinois, the transfer of the property in question would be governed by the law of that State, and, according to the evidence given as to the foreign law, the transfer was valid and effectual, and not in any wise void or voidable as being a preference, or otherwise. There is no Bankrupt or Insolvent Act in that State.

I see no evidence to warrant a finding of preference or fraudulent intent on the facts of this case; and the learned Chief Justice has found against the defendant on that point.

If we deal with the property as situate in Ontario and subject to our laws, then I am of the opinion that what took place when McDonald & Thompson gave receipts direct to the bank was a transfer of both property and possession as between Chisolm Bros. & Gunn and the plaintiffs. The defendant had nothing then to say as to it. The only person who could interfere was the trustee for creditors in Illinois, if the property in the goods had passed to him by the assignment. As between McDonald & Thompson and the plaintiffs from that moment they held for the plaintiffs, and were answerable to them alone for the goods or their value: *McMaster v. Garland*, 8 App. R. 1; *Mitchell v. Goodall*, 5 App. R. 164.

The goods being in the possession of a third party and

not of Chisolm Bros. & Gunn, the Act as to bills of sale and chattel mortgages does not apply: *Harris v. Commercial Bank*, 16 U. C. R. 437, 446; *Burton v. Bellhouse*, 20 U. C. R. 60; *McMaster v. Garland*, 8 App. R. 1, per Spragge, C. J. O.

The Act as to banks and banking and warehouse receipts cannot apply to the plaintiffs, a foreign banking corporation.

The result may be thus stated: The firm of Chisolm Bros. & Gunn being indebted to the plaintiffs, and being pressed by them for security, transfer to them the goods in question in manner and form sufficient in the State of Illinois to transfer property in goods, such transfer not being in such State either void or voidable, and according to the laws of Ontario being also valid, no preference or fraudulent intent being shewn.

Subsequently, and prior to the defendant's recovery of judgment, the firm of Chisolm Bros. & Gunn made an assignment to a trustee in Illinois for the benefit of creditors, so that, if the property in the goods had not at that date been vested in the plaintiffs, it became vested in the assignee. Subsequently, and prior to judgment and execution of the defendants, the bailees of the goods in Ontario, under the directions of Chisolm Bros. & Gunn, undertake to hold the goods for the plaintiffs, so that then the possession of the goods was changed to the plaintiffs, and if any property in the goods then remained in Chisolm Bros. & Gunn, it became vested in the plaintiffs.

It follows therefore that at the date mentioned in the interpleader issue, *i. e.*, the 22nd November, 1883, neither possession nor property was in the firm of Chisolm Bros. & Gunn, but both or one or the other were either in the plaintiffs or the assignee in trust. I am of the opinion that both property and possession were at such date in the plaintiffs, and that the motion fails and must be dismissed, with costs.

CAMERON, C. J., and GALT, J., concurred.

Motion dismissed.

[COMMON PLEAS DIVISION.]

CAIN V. JUNKIN ET AL.

Crown grant—Description—Error—Evidence—Possession.

In 1851 J. purchased the whole of lot 20 from the Crown, the lot nominally containing 200 acres, and described in the Crown Lands Department Books as containing 175 acres more or less. On 30th October, 1852, before taking out his patent, J. sold and assigned, by a written assignment to R., the east half or part of the lot described as seventy-five acres "neither more or less." In 1863 R. sold to B. his interest in this parcel, described as containing "75 acres more or less," and as being composed of the east part of the lot. On 22nd July, 1883, B. took out a patent of his portion, the land being described as "75 acres more or less," being all the lot except the west 100 acres. On 28th August, 1868, J., who retained all he had not sold to R., took out a patent himself, the land being described as the west 100 acres, without the words more or less, these words having been erased from the printed form on which the patent was written. Subsequently B. reconveyed to R., through whom the plaintiff claimed as heir of his father, and as having acquired the title of the other heirs. J., after obtaining his patent, conveyed the northerly and southerly portions to his two sons, the defendants. About the time J. took out his patent, by instructions from the plaintiff's father, a surveyor ran a line dividing the 75 acres from the 100 acres; and in 1874 he procured another line to be run under instructions to lay off the 75 acres, which was done, and the plaintiff's father and J. jointly erected a fence on such line. In 1883 the plaintiff discovered that the actual acreage exceeded 175 acres by some 11 acres. The actual occupation under B.'s patent was confined to the 75 acres.

Held, that B.'s patent would of itself include the 11 acres; and there was nothing to shew that the patent was issued by fraud or mistake so as to entitle defendants to have it reformed; and that defendants on the evidence, except as to a small portion thereof, failed to shew any possessory title to the land in question.

THIS was an action of ejectment brought to recover a strip of some eleven acres of land, being part of lot No. 20, in the 10th concession of the township of Verulam.

It was admitted that that the plaintiff was entitled to whatever the patentee of the Crown got.

The cause was tried at the Spring Assizes of 1884, at Lindsay, before Patterson, J. A., without a jury, who delivered the following judgment, in which all the facts so far as material are stated :

PATTERSON, J. A.—In this case I have had an opportunity of looking at the authorities to which I was referred yesterday, and I do not think there is any object in deferring any longer disposing of the case. I think I am

probably in possession of the facts as fully as I can be, and I may as well dispose of it now.

The plaintiff brings his action against each of the defendants, James Junkin and William Junkin, raising, with respect to each of them, the same question, that is, his right to a strip of land east of the west 100 acres of lot 20.

The facts on which the contest arises are rather peculiar. The whole lot No. 20 is shewn to have been sold to James Junkin in the year 1851, the lot nominally containing 175 acres and being described as containing "175 acres, more or less," in the books of the Crown Lands Department. As far as the evidence goes it would appear that James Junkin was entitled to a patent for the land.

Before taking out any patent he sold and assigned by a written assignment or deed to David Russell on the 30th October, 1852, "the east half or part of lot 20," described in the instrument as 75 acres, "neither more nor less." Russell is shewn to have taken possession under that assignment and to have continued in possession up to the year 1863, when he sold out to Bradburn and left the place. The sale to Bradburn conveyed of course nothing but what Russell had a right to convey, and the description by which he assigns to Bradburn does not necessarily import anything more, although it is not worded as to call attention to the peculiarity of the assignment under which Russell held, and in which the words "neither more or less" are contained. In his assignment to Bradburn he conveys all his right and title to a "parcel of land" containing "75 acres, be the same more or less, and being composed of the east part of clergy reserve lot No. 20, in the 10th concession of the township of Verulam." That description by itself is not very definite. If construed by itself it would necessarily be held to be 75 acres neither more nor less, and it therefore would be construed in precisely the same way as it happens the construction must be with reference to Russell's own title, which was 75 acres neither more nor less.

Bradburn, who had only Russell's right under that instrument, takes out a patent on the 22nd July, 1863, which describes the land in a very different way from the description under which he obtained the right from Junkin. That patent describes it as "75 acres, be the same more or less," and as being all the lot except the west 100 acres, the description being by metes and bounds, and running to the line of the west 100 acres.

It is quite clear that under the effect of that patent

Bradburn would take up to the line of the west 100 acres whether that would give less than 75 acres or more than 75 acres. In point of fact there turns out to be a surplus of 11 acres, which under the description of that patent would pass to Bradburn.

Junkin who retained all he had not sold to Russell, took out a patent himself in 1868, on the 28th August, which is simply a patent for the "west 100 acres." The words more or less are not contained in the patent. It is simply for the "west 100 acres," and it appears that the words "more or less" are deliberately excluded, being actually erased from the printed form on which the patent is prepared. Junkin, therefore, takes out a patent in 1868 for a definite and absolute quantity, 100 acres, which is quite consistent with the patent to Bradburn which gave him all the land east of the west 100 acres.

Bradburn re-conveyed to Russell after obtaining his patent, and the title has come down through mesne conveyances to the present plaintiff, the present plaintiff claiming as one of the heirs, and as having acquired the title of the other heirs, of his father John Cain, who died in the year 1876.

The evidence shews that, notwithstanding this description by the patent which gave to Bradburn 75 acres, more or less, up to the west 100 acres, the occupation, which was held under the Bradburn patent, was confined to the absolute quantity of 75 acres.

Cain himself, the ancestor of the plaintiff, is shewn by Mrs. Flanagan, who was the widow of Russell, to have had a line run a number of years ago by a surveyor named Dennehy; and at a later day he had a line run by Dickson—in 1874.

It is quite clear upon the evidence that Dickson ran that line upon instructions from Cain, and his instructions were to lay off 75 acres, the absolute quantity, and he did so, and upon the line he ran the parties Cain and Junkin jointly made a fence. That fence was made in the year 1875, and, as far as the actual question of fencing becomes important in the consideration of the question of possession under the Statute of Limitations, it will only be from the erection of that fence in 1875 that that particular period would run.

Before I speak of the question of possession there is another question raised. This acquiescence in the line I have spoken of continued till some time last year, when

the present plaintiff having discovered there was a surplus over 175 acres in the lot, and thinking that upon the construction of the patent under which he held the surplus might be held to belong to him, raised the question which is the one I am now about to discuss.

The defendants urge that these patents were issued by the Crown under a mistake: that the patent to Bradburn, which gave him all the lot which was east of the west 100 acres, gave him that description by an error, because he was entitled to nothing more than what he had bought from Russell, and that all Russell had would be the absolute quantity of 75 acres; and that consequently the patent should have followed that description, and the patent to Junkin should have been for the remainder of the lot, and not simply for the absolute quantity of 100 acres; and it is contended that, under the law which gives power to the Court to adjudicate upon matters of this sort, the Court should declare the patent invalid as issued by mistake on the part of the Crown: that the operation of this patent should be confined in the same way as the deed from Junkin to Russell.

One answer which is made on the part of the plaintiff is that the patent can only be assailed by the person who was entitled before the issuing of the patent to the land which the patent may have granted to some one else, and that a person claiming his title merely cannot raise the same question.

There would seem to be a great deal of reason why such a doctrine as that in ordinary cases ought to prevail. A patentee, entitled to more land than he could actually get by reason of some erroneous conveyance being made to another, can complain and have things set right by a suit in Court. That is a right which is distinct only as far as it concerns the person immediately entitled. The case is not necessarily the same where a purchaser from the patentee, buying merely what the patent conveys, assumes to urge that the patentee, who conveyed him all the patent conveyed, really ought to have had more, and therefore claims to set up the right of having the patent amended and extended as the patentee himself might have done.

That doctrine which would confine the right has been the subject of discussion in two of the cases to which I was referred: *Martin v. Kennedy*, 4 Gr. 61; *Mutchmore v. Davis*, 14 Gr. 346.

With the assistance of the discussion of the subject in

these cases I have come to the opinion myself that there would be no reason why the present defendants ought not to be allowed in this case to set up, as against the claim of the plaintiff, any right that their father, from whom they have the conveyance of their land, might himself have set up.

The distinction between a case of this kind and a case such as I was supposing this moment seems to be very intelligible, and it is that where the right claimed by the assignee of a patentee is merely to bring an action to vacate a patent, no such right on his part is recognized to pass. But here what he takes is something in actual possession, and what he assumes to do now is not merely to set up a claim to something which he has not got, but to defend what he has been actually given possession of.

The case of *Martin v. Kennedy* was a case of the same kind, probably a stronger case than the present, because there the plaintiff, who was actively asserting his right to disturb the existing state of things, was himself a person who held by derivative title only.

On page 92 of the 4th volume of Grant, the late Vice Chancellor Esten discusses the leading cases upon which this question was argued.

The case of *Prosser v. Edmonds*, 1 Y. & C. 481, I only refer to now as I find it quoted in these cases of *Martin v. Kennedy*, and *Mutchmore v. Davis*.

In the case of *Martin v. Kennedy*, the right to purchase, which was being asserted, was a right which had vested in a man named Tripp, in the year 1832. The patent which was assailed had been issued in 1836, and it was Tripp's right which had come down by a process of devolution to the plaintiff, so that Martin was simply asserting in that action the right which had been in Tripp at the issue of the patent.

In the case of *Mutchmore v. Davis*, Vice Chancellor Spragge, the present Chief Justice of Ontario, refers to the case of *Prosser v. Edmonds*, and refers to it in connection with the facts in that case of *Mutchmore v. Davis*, which were very different from those which we have to deal with here.

In the case of *Mutchmore v. Davis*, the patent had been issued to Tiffany in 1838. By the description in that patent a much larger extent of land than there was any idea of granting was included. It covered some 800 or 900 acres altogether; and, years after, patents were issued for portions

of the land which had been covered by this description in the patent to Tiffany; and the persons claiming under these later patents attacked the patent to Tiffany as having been issued improperly, but at a time when they had no interest whatever in the lands, and when they were total strangers to the land. It is with reference to facts such as these that the learned Vice-Chancellor speaks as reported in 14 Gr., at p. 351:—"Where an equitable interest is assigned, it appears to me that in order to give the assignee a *locus standi* in a Court of Equity, the party assigning the right must have some substantial possession, and not a mere naked right to upset a legal instrument."

I think that under the facts we have here there is nothing to prevent the Junkins raising this question. Whether they ought to succeed upon the question, however, is a matter of a great deal more importance. I have not been able to make up my mind to the conclusion that the defendants urge with respect to their right to succeed. The matter stands in this position with reference to the facts: Junkin, the defendants' ancestor, takes out his patent and apparently is content with it as conveying simply the west 100 acres. He has not himself made any complaint. It is quite true, if there was nothing more between the parties than what is shewn by those earlier assignments, that when Junkins assigned to Russell 75 acres, neither more nor less, Russell would have been entitled to 75 acres, and Junkin could have insisted on his patent for the remainder: but he has not so insisted. He appears to have been content to take his patent for the west 100 acres; and I have not been able to see my way to hold that any facts which we have here would enable the Court to say that either of the patents was issued by mistake.

I think the case rests very much on the same footing as it would rest upon if Junkin had, at the earliest day we hear of, been the actual patentee and owner of the whole lot; if being the owner of the whole lot he had made an agreement to convey to David Russell 75 acres only, and expressing in the agreement that he retained for himself all the rest of the land; and then at a later date, when he came to give his deed to David Russell, if he gave to Russell his deed for the land which this patent granted to Bradburn, retaining to himself by the effect of that conveyance only the absolute 100 acres. If a document of that sort were in question here, the necessary conclusion would be, in the absence of any direct evidence of fraud or mistake,

that what was done was intentionally done: that although Russell could have only insisted on the strict letter of the agreement, yet the same person who made that agreement did give more than he had originally bound himself to give.

Under the evidence we have here I do not see that there is any substantial difference from what there would have been in the case I have just been supposing, and an agreement in that way, followed up by an actual conveyance. How it was that the parties actually in possession have looked upon this 75 acres as being an absolute quantity, whether there was an overplus or not, is a matter which I think, is probably immaterial, and certainly is not shewn in such a way that it can be made use of as a consideration in adjudicating upon the rights of the parties.

I am not able to say at present that there is anything sufficient to shew that the patent was issued by mistake: that Junkin was entitled to any more than he got; or that Russell was not entitled, as between him and Junkin, at the time the patent was issued, to what was actually granted. What may have taken place in these years between 1852 and 1863, we don't know. We find things as they are; and, taking the fact that Junkin has not interfered or complained, I am not able to say there is any solid ground upon which I can say there was that error that could justify the Court in interfering.

That leaves the question between the parties simply that of possession. It is clearly shewn that there is a strip of 11 acres between this line of Dickson's and the line of the west 100 acres. That, according to the terms of the patent, would belong to Cain, the plaintiff.

The question is, whether the defendants have acquired a title under the Statute of Limitations which would enable them to resist the plaintiff's legal right. It is satisfactorily shewn that, as far as the distance of 18 rods from the northern boundary of this land, James Junkin has had possession; and to that extent I am satisfied the statute has run in his favour, he having taken actual possession of that at an earlier period than the running of this line by Dickson.

It is argued that the possession is not shewn to be continuous; but I think, from the character of that possession there, the proper inference is that the possession was continuous. He cultivated and cleared that particular portion of land, and there is nothing to shew that he retired from that possession, but on the contrary it was recognized in

the year 1874, by the running of this line, and in 1875 by actually putting up a fence, and it was in 1873 he was taking off a crop which was put there. As to the remainder, I am afraid the course of decisions under the statute makes it impossible for me to hold there has been a sufficient possession to give a title.

What has been shewn, and what I am quite satisfied was the fact, is, that the line understood between the parties and recognized between them was either this Dickson line or for an earlier period a line which went further in on the plaintiff. That line, run by Dennehy, was recognized as being the dividing line between them, and whatever the parties did was done with reference to that line. If timber was cut, or any act done, that was the line which they recognized as the line between them.

I do not think from the evidence there were any acts done which would amount to an act of dispossession which would give ground for the Statute of Limitations to operate. I do not think their acts are any stronger than the actual recognition of this line by the parties upon each side of it, and adopting it as the line between them. If that circumstance can be held to give operation to the statute I should be very glad to hold that was the case, because I think, taking the circumstances all together, there would be no injustice whatever if the plaintiff failed in this action.

I am not able to say at present that the authorities would justify me in holding there was a dispossession on which the statute would operate.

The question of discontinuance of possession is one which has been discussed in some of our cases.

It has usually been held that one party cannot be held to discontinue possession unless there is another in actual possession in whose favour the Statute would run; and the leading authorities on that doctrine, I believe, are to be found in *Ketchum v. Mighton*, 14 U. C. R. 99, and *Pringle v. Allan*, 18 U. C. R. 575. There have been some cases lately, but the tendency of the decisions I believe is, that it would not be considered a discontinuance of possession merely from the fact of the line being recognized by the parties, and they, in ignorance of their actual rights, having considered that to be the line between them.

I will have to hold that, as far as the operation of the Statute is concerned, it only assists the one defendant, and that to the extent I have mentioned, that is to say, to 18 rods.

The plaintiff will therefore be entitled to judgment against the defendant William Junkin, and against the defendant James for all that is not covered by his title by possession.

During Easter Sittings, *Hudspeth*, Q.C., moved on notice to set aside the judgment entered for the plaintiff, and enter judgment for the defendants.

During the same sittings, June 5, 1884, *Hudspeth*, Q. C., and *Watson*, supported the motion. There was clearly sufficient evidence of acts of ownership in the defendants to give them a title by possession. The evidence shews that the defendants exercised acts of ownership up to the line run in 1863. The principle on which this case is governed is that laid down in *Steers v. Shaw*, 1 O. R. 26, 33. The learned Judge at the trial in giving judgment evidently overlooked this case. See also *Davis v. Henderson*, 29 U. C. R. 344; *Elliott v. Bulmer*, 27 C. P. 217; *Mulholland v. Conklin*, 22 C. P. 372. The plaintiff is estopped by his acts and conduct from denying that the line run was the true boundary line. In any event the defendants are entitled to an order or decree setting aside the patent to Bradburn as issued by fraud or mistake. All that Russell could assign to Bradburn was, what he acquired from Junkin, and that was 75 acres, "neither more nor less," which would limit him to the 75 acres alone. They referred to *Stevens v. Buck*, 43 U. C. R. 1; *Sheridan v. Barrett*, 4 Ir. C. L. R. 223, 227 (1879-80); *Acheson v. McMurray*, 41 U. C. R. 484, 495; *McArthur v. Eagleson*, 43 U. C. R. 406, 416, 429; *Boyle v. Arnold*, 16 Gr. 501.

Poussette (of Peterborough) contra. There was no sufficient evidence of possession shewn here. The defendants so far as the land in question is concerned must be treated as mere trespassers, and the evidence of possession in such case must be of the strongest character. It must be actual and visible, and not merely constructive possession. The plaintiff claims under his patent as owner, and therefore he is entitled to the possession of all the land

covered by his patent which was not actually and visibly taken possession of by the defendants. No principle of estoppel arises here. There is no evidence to shew that the line in question was ever adopted as the boundary line. No relief can be given by way of reformation of the patent. In any event it cannot be given as against the plaintiff, who is not the original patentee, but the assignee of the patentee: *Mutchmore v. Davis*, 14 Gr. 346.

June 26, 1884. ROSE, J.—The questions for our consideration are:

1. Admitting the patents to be unassailable, does the defendant shew any facts which by reason of the Statute of Limitations or estoppel prevent the plaintiff recovering under his paper title?

2. Can the patent issued to James Bradburn be successfully impeached?

It seems not at all improbable that the fact of a surplus in the lot did not become known until after the survey in 1874. On such a supposition the action of the Crown Lands Department is explainable in issuing the patent to Bradburn in 1863, with the description it contains, notwithstanding that the department had before it the assignment Junkin to Russell, restricting the conveyance to neither more nor less than 75 acres. Supposing that 175 was the acreage of the lot, the description by metes and bounds running the side lines to the westerly 100 acres, and adding the words more or less to cover any irregularity in the exact measurement, would not be unnatural, although the description is a somewhat careless one. This would also enable one to understand the action of Junkin in accepting his patent four years after the issue of the patent to Bradburn, and not objecting to the description being an exact 100 acres, the words "be the same more or less," having been struck out of the patent. I am clear that the plaintiff did not know of the surplus in 1874, when he gave instructions to have the line run and the fence built, else his action is inexplicable.

If I am right in my conclusion, then neither the original purchaser from the owner, nor the purchaser from him of the 75 acres, ever acted, either by payment of purchase money or otherwise, with relation to such excess, and the discovery of the excess discloses a fact of which the person legally entitled can take advantage.

The notes of evidence commence with the admission that the "plaintiff is entitled to whatever the patentee of the Crown got." I suppose this means that his right is as high, but no higher than that of the patentee Bradburn. If this is the effect of the admission it may turn out to have been exceedingly generous on the part of the plaintiff to accept it in so limited a form.

We are asked to reverse the judgment on the grounds:—

1. Of a statutory title in the defendants. 2. A conventional boundary line which the plaintiff is estopped from denying. 3. To make a decree or order setting aside the patent on the ground of mistake or fraud.

As to the Statute of Limitations, the time did not begin to run until after the issue of the patent, either against the Crown or between the parties. As soon as the first patent issued in 1863, the patentee might have ejected his vendor, the original purchaser from the Crown, from the land in question, even though he had been in possession more than twenty years, and no answer at law could have been made to the action: *Jamieson v. Harker*, 18 U. C. R. p. 590; *Dowsett v. Cox*, *Ib.*, p. 594.

And this would be so, even though they had prior to the issue of the patent agreed upon their dividing line. The only remedy available would have been by bill in equity to set aside the patent, a remedy which we are to consider if it can be granted on the facts of this case.

That being so, it is clear that we must look at the acts of ownership since 1863, to determine whether the defendant the son of James Junkin, the original purchaser, either himself, or through his father, can successfully set up a statutory title. Prior to the issue of the patent, or about the same time, the first line was run setting off

the 75 acres. There is no evidence of the patentee exercising acts of ownership subsequent to the issue of the patent. He obtains his patent in August, 1868, and in November following conveys the northerly portion of his 100 acres to his son James and the southerly portion to William. James about the same time clears a portion of his land up to the line run in 1863, but only for a distance of 18 rods. Beyond this no clear act of ownership is shewn by either himself or William until 1874, when the second line was run and the fence erected. The second line was not on the original line run in 1863, but some rods further west. . To this no objection was raised.

I am inclined to think the first line could not have been well marked on the ground or acted upon, else why the necessity for a second survey, and why did not James and William object to its being brought some 2 or 3 rods farther westward on their lands ?

Unless the running of the conventional line in 1863 was followed by possession of the land thereto for ten years prior to the bringing of this action in 1883, it avails nothing. Such possession must be most clear and certain : *Shepherdson v. McCullough*, 46 U. C. R. 573, 589 ; *Harris v. Mudie*, 7 App. R. 414 ; *Steers v. Shaw*, 1 O. R. 26.

As to a trespasser possession must be actual and visible and not constructive : S. C.

When the patent issued in 1863, Bradburn had at once constructive possession of all the land embraced in his patent, and I do not find such acts of ownership since the date of that patent, and prior to 1874, as enables me to differ from the finding of the learned Judge at the trial on that point.

I see nothing in the doctrine of estoppel which I can apply to assist the defendants. The plaintiff has not, so far as I can see, led the defendant to so change his position by any act or representation of his, upon which he had a right to rely, as to enable him to raise such a defence. If he has effected any improvements under a mistake of title, his relief would be under 36 Vic. ch. 22, O. No claim has

been made for such relief. If made, it will be received with favour, as the plaintiff's claim may be strictly legal, but on the facts set out in the evidence does not provoke much sympathy.

The remaining question is as to the relief asked for, in the nature of a decree under the former practice, to have the patent declared void. The patent which is thus attacked was granted by the former Province of Canada. The Attorney General, so far as he has power, has consented to be made a party and instructed the defendants' counsel to represent the Crown at the trial for such purpose, and to submit to such order as the Court might make. There are, however, many difficulties in the way.

The first patent was granted in 1863, and granted the excess in the lot. The second was taken out in 1868, and was strictly confined to the 100 acres, the words more or less being stricken out without objection, or if objected to then, unavailingly. Twenty-one years have elapsed. The patentee of the 75 acres, more or less, in January, 1864, re-conveyed the land so patented to Russell, who in March of the same year, conveyed to Hunter, whose heirs in March, 1872, conveyed to McIlmoyle, who in April of same year conveyed to Cain whose heirs are claiming in this suit. There is no evidence that these sales and purchases were made relying on the description in the patent, and the plaintiff says that McIlmoyle, when he sold to his father, told him there was a surplus in the lot which passed under the deed. I cannot reconcile this statement of the plaintiff with his action as to the fence, except on the supposition that he thought the survey would reveal the excess. It did reveal an excess of about 3 rods (about an acre) and if the surveyor had had the descriptions before him as he should have had he would have discovered the facts at that time.

On the evidence of the assignment in 1852, containing 75 acres neither more or less, the survey, at or about that time, which was abandoned in 1874, and the survey in 1874, can I, keeping in view the other facts, come to the

conclusion that the learned Judge has arrived at a wrong conclusion? I fear not, much as I sympathize with his observation that "taking the circumstances all together, there would be no injustice whatever if the plaintiff failed in this action."

In addition to the authorities above referred to, I have referred to those cited on the argument with the references therein contained, and have derived much assistance in consultation with the learned Chief Justice of this Court who, though, unfortunately, through indisposition, unable to be present during the argument, and so unable to take part in the judgment, had previously very fully considered the cases as to possession and conventional boundary or division lines, for the purpose of giving judgment in the cases above referred to of *Shepherdson v. McCullough*, 46 U. C. R. 573; *Harris v. Mudie*, 7 App. R. 414, and *Steers v. Shaw*, 1 O. R. 26.

In my opinion the motion must be dismissed, and I see no rule upon which I can act to say without costs. It must therefore be with costs.

GALT, J., concurred.

CAMERON, C.J., was not present on the argument, and took no part in the judgment.

Motion dismissed.

[COMMON PLEAS DIVISION]

MULHOLLAND V. HARMAN ET AL.

*Ejectment—Possession obtained by attornment from plaintiff's tenant—
Evidence of paper title—Registered memorial.*

Where the defendant, claiming to be the owner of certain land, procured the plaintiff's tenant to attorn to him and thereby claimed the possession: *Held*, in ejectment, that the plaintiff was entitled to recover by reason of the defendant having thus obtained possession from the plaintiff's tenant; but that this was not to estop the defendant from disputing the plaintiff's title and shewing title in himself in any action he might bring to recover possession.

Evidence in proof of a paper title in the defendant commented on.
The production of a registered memorial executed by the grantee, where possession is not shewn to follow the deed, is not sufficient evidence in proof of the deed.

THIS was an action of ejectment, for the recovery of the east half of lot No. 17, in the fourth concession of the township of King, in the county of York, tried before the Chief Justice of Ontario, then Chief Justice of the Queen's Bench Division, at Toronto, on the 30th of day of April, 1884, without a jury, and judgment given by him in favor of the plaintiff, on the 7th of May, 1884.

The plaintiff in his statement of claim alleged that John McLean, seized in fee of the land, by indenture, made the 16th day of April, 1853, granted and conveyed to the plaintiff, his heirs and assigns, part of the said lot 17, described as follows:—Commencing at the south east angle of the said lot, where a post has been planted in front of the said concession; then north, nine degrees west, twenty chains; then south, seventy-four degrees west, fifty chains; then south, nine degrees east, twenty chains; then north, seventy-four degrees east, fifty chains to the place of beginning—That shortly after the said conveyance, the plaintiff entered into possession of the lands, and by himself and his tenants continued in the actual and beneficial possession thereof for ten years and upwards, and until he was dispossessed by the defendant as after mentioned: that in May, 1882, the plaintiff leased the said lands to

one George Kirk, who entered into possession, and continued in possession, till June, 1883: that about the month of June, 1883, the defendant Pearson induced the said George Kirk to deliver up possession of the said lands to him, and Pearson then took possession, and put the defendant Harman in possession as his tenant: that the defendants refused to give up possession; and the plaintiff claims possession of the said lands.

The writ of summons claimed the "north-west half" of the said lot.

The defendants in their statement of defence alleged that the defendant Pearson was in possession by his tenant, the defendant Harman: that one John Beam was on and prior to the 4th of June, 1831, the owner of the lands in question, and by a good and sufficient deed, bearing date that day, granted and conveyed the same to one Daniel Lewis, through whom by good and sufficient mesne conveyances the defendant Pearson makes title: that the said Beam, who claimed an interest in the west half of the lot, subsequently about the 7th of March, 1837, by an instrument, bearing that date, purported to convey the west half to the said John McLean, in the plaintiff's statement of claim named, describing the same in these words: "One hundred acres, more or less, being composed of the north west one half of lot 17, in the fourth concession of the said township of King:" that the said McLean was never possessed of the east half of the said lot, or of any interest whatever therein, or any valid claim thereto, nor did he ever claim any such, but by the instrument of the 16th of April, 1853, in the plaintiff's statement of claim referred to, he intended to convey, if at all, the said west half of the lot conveyed to him by Beam, the full description being as follows: "That certain parcel or tract of land and premises, &c., containing one hundred acres, more or less, being composed of the north west half of lot No. 17, in the fourth concession of the township of King, which said one hundred acres of land is butted or bounded as follows, that is to say: Commencing at the south east angle of the said lot,"

&c., the rest of the description being the same as that in the plaintiff's statement of claim set out: that the said deed did not, and could not operate to convey any interest in the said east half of the said lot, as the said John M'Lean did not, nor did the said John Beam after his conveyance of the said lands as aforesaid, possess or claim any interest in the land in question, and the description by metes and bounds in the said conveyance of the plaintiff was made by mistake, of which mistake the plaintiff fraudulently seeks to take advantage, to the prejudice of the rights of the defendant Pearson: that the defendant Pearson has been in the actual beneficial possession of the said lot, both personally and by his tenants, for the past ten years and upwards; and if the plaintiff has secured any apparent acknowledgment of the title from some or one of the said tenants, as the defendant Pearson is advised and believes the fact to be, the same was fraudulently got, and fraudulently concealed by the plaintiff from the knowledge of the defendant Pearson and his grantors, the owners of the land; and the defendant Pearson claims that the same cannot avail the plaintiff to confer any title by possession or otherwise upon him. And the defendant Pearson claimed by way of cross-relief and counter claim, that the conveyance referred to in the plaintiff's statement of claim should be, by order of the Court, either reformed so as to expunge therefrom all reference to the east half of the said lot, of which the defendant Pearson is the sole owner in fee simple, or that the same should be delivered up to be cancelled, as forming a cloud upon his title to the said land.

The evidence, so far as material, is set out in the judgments.

The learned Chief Justice endorsed the following finding on the certified copy of the pleadings:

"I find that the plaintiff is entitled to the possession of the land for which this action is brought, being the east half of lot 17, in the fourth concession of the township of King; and I decree that he have judgment for the recovery

thereof from the defendants, with his costs of suit, and award writs of possession and execution for such costs."

In addition to this finding, he gave the following judgment :

HAGARTY, C. J.—Ejectment for east half lot 17, in the fourth concession King.

The plaintiff failed to prove any paper title.

He stated that after getting a deed from one John McLean, on 16th April, 1853, purporting to convey the north-west half of the lot, but giving the butts and bounds of the east half, he had a saw mill on lot 15 in the same concession, and gave a lease, dated 17th December, 1858, to George Henry, demising to him for four years from 1st December, 1858, certain premises including the saw mill, and with power to enter into and upon certain other lands including the north half of lot 17, 4th concession, containing 100 acres, and to cut timber therefrom : that Henry remained in possession, cutting timber over twenty years : that Richard Harman (the defendant's brother) entered in 1870, and on 1st October, 1872, the plaintiff made a lease to him (produced) of the east half of this lot for four years from that date at a rent of 20c. per annum, payable 1st October in each year : that the tenant put up buildings, and made improvements : that in the spring of 1882, the plaintiff gave a lease (produced) to G. W. Kirke, of this east half, dated 1st April, 1882, for five years at \$50 rent, and Harman gave him possession : that afterwards the defendant Pearson induced Kirke to take a lease from him in consideration of a money payment.

On the defence a somewhat different state of facts was disclosed.

A number of deeds were put in, which, though not proved with full accuracy, and with great confusion in the descriptions, left little doubt but that the paper title was in the defendant.

I propose to consider it on the possessory title.

Timothy Harman swore that he was in possession of the south half of the lot for four years beginning about twenty years ago. He entered under Draper, an American apparently engaged in the lumber business, and claiming, as I understand, under a deed to him from the late Mr. T. C. Street of the south half, of which a memorial was produced in the defence, dated 18th January, 1853. When he entered

one Burton had a shanty there under Draper. Sixteen years ago Harman left, selling out to his brother Richard Harman. The witness made a clearance and built a house. No one was in possession of the north half. Draper sold large quantities of lumber off it.

Richard Harman swore that he entered sixteen years ago under his brother Timothy, with Draper's assent. Draper was overseeing the lumber and sold some to Burton, some to Henry (the plaintiff's lessee). Draper told witness to pay his brother for his improvements. He denied having anything to do with Henry. About 1870, he says, he was threatened by the plaintiff, who disputed his right and urged him to take a lease from him and to pay rent. He said he would send the lease to Henry. The lease lay with him about two years, and at last, by Henry's advice, witness executed it 1st October, 1872. He does not think he ever paid any rent to the plaintiff, as the latter asserts. This lease expired in 1876. He says he remained about three years longer, till Pearson (defendant) came and said he had bought the place from McKay.

Witness moved off, giving Pearson possession. Witness remained till about two weeks before Kirke came.

On 20th December, 1879, witness took a lease for two years from Pearson of the east half at a rent of \$1 per year.

On the 1st April, 1882, Kirke took a lease for two years, and it is clear that Pearson induced him to take a lease, paying him money so to do.

Benjamin Pearson, the defendant's father, states that his son Dennis bought the land from McKay, and afterwards sold to the present defendant Pearson: that witness went to the lot, and saw Richard Harman, and wanted possession, and in December, 1879, Harman took a lease, and afterwards paid rent.

He says that Harman left and locked up the house, and gave witness the key. When witness next went he found Kirke in possession under lease from the plaintiff, and afterwards Kirke took a lease from the defendant.

Evidence was given of sales of timber and acts of apparent ownership by Draper, and lumbering and sales of timber by Burton, apparently under Draper, about 1881-2.

All of the east half was wild land unimproved until Timothy, and afterwards Richard Harman, made improvements. Timothy went on to the south half of the lot which Draper claimed about twenty years ago, cleared a little and built a house. Henry was cutting timber then on the

north half and told Harman the north half belonged to the plaintiff. Then Richard Harman entered on the south half.

Up to the time that the plaintiff persuaded Richard to take a lease from him in October, 1872, the north half was certainly in wild state.

Any possession obtained under Draper was certainly only of the south half.

Great confusion was created by errors in the descriptions.

Adair was patentee and sold the whole lot to Beam. Beam sold the east half to Lewis in 1831. Then in 1837 Beam appears to have sold the north-west half to McLean, and in 1853 it seems that McLean sold to the plaintiff the north-west half.

If these deeds be legally in evidence it seems clear that McLean had no title in the east half to convey to the plaintiff, as it had been previously sold to Lewis.

But whether in evidence or not the plaintiff must rely wholly on a possessory title. He rested on ten years' possession before the defendant's entry. He has to rely on his possession through Richard Harman under lease from 1st October, 1872.

I do not think that the alleged attornment by Richard to the defendant Pearson in December, 1879, can prevail to break the plaintiff's possession. When Richard was persuaded to take the lease from the defendant I think he was clearly the plaintiff's tenant, and under the authorities he could not legally attorn to a stranger to his landlord's prejudice. Several cases in our Courts were referred to: *Doe d. Miller v. Tiffany*, 5 U. C. R. 79; *Kyle v. Stocks*, 31 U. C. R. 47; *McLennan v. Hannum*, 31 C. P. 210.

Woodfall's L. & T., 12th ed., p. 246, refers to the statute 11 Geo. II. ch. 19, sec. 11, declaring all "attornments made by tenants to strangers claiming title to the estate of their landlords shall be null and void, and their landlords' possession not affected thereby," except in certain stated cases.

This statute is noticed in *McLennan v. Hannum*, 31 C. P. 210, per Osler, J.

Doe d. Bullen v. Mills, 2 A. & E. 70, seems an express authority.

Doe d. Haden v. Burton, 9 C. & P. 254, at p. 257, is to the same effect. The parish officers put a pauper named Burchall into a cottage. The lord of the manor persuaded Burchall to go into another cottage, and put the defendant into possession. It was held that his tenant could not

dispute the title of the parish officers: *Woodfall's L. & T.*, 332.

As to the south half of this east half the plaintiff is met by another objection to his possessory claim.

Donald McKay swore that in 1873 he purchased the east half by deed from Joseph Kirke (produced). There it is called the south half of 17. In the margin is a memorandum: "should be the east half as described in Indenture No. 8229," (initialled) "J. C." He went on the lot, saw Richard Harman, and forbade him cutting, and told him the land belonged to him (McKay). This was between 1873 and 1877. Harman told him he was afraid of the plaintiff. McKay swears that when he bought in 1873 there was no clearing on the north-west half.

In August, 1877, the plaintiff came to him respecting this land and some other lots. After some negotiations articles of agreement were executed under seal, reciting that McKay had agreed to sell and the plaintiff to purchase the south half of this lot (with other lots): that the plaintiff agreed to pay the purchase money by 1st October following, and McKay, on payment of purchase money, agreed to convey to the plaintiff by a sufficient deed in fee simple with usual covenants, and permit the plaintiff to occupy, &c., till default. McKay was not to be bound to furnish abstract of title or produce title deeds, &c. The plaintiff was to search title at his own expense. If McKay, without any default on his part, could not make a good title within thirty days from date, and if the plaintiff declined to take such title as he was able to make, then the plaintiff might withdraw from the contract.

On September 26th the plaintiff wrote to McKay to defer his coming until 6th October. "I am raising the money, and may not have it before that day. There is a great deal of slander about the land, particularly of lot 17. People say neither of us have any title; but I think with good management we may overcome every difficulty, although there does appear to be some foundation about there being two dowers; but I hope it's all right."

If a good title had been shewn in McKay, I think all this amounted to a good acknowledgment in writing under the statute, of McKay's right to the land, so far as the south half is concerned. The subject is treated in *Darby* on Statutes of Limitations, 292, and *Banning* on Limitation of Actions, 119.

"No particular form of acknowledgment is required. One

is sufficient which practically amounts to an admission of the lawful owner's title." *Lessee of Corporation of Dublin v. Judge*, 11 Ir. C. L. R. 8 (1849); *Doe d. Curzon v. Edmonds*, 6 M. & W. 295.

The construction of any acknowledgment of title is a matter for the Court.

McKay did not attempt to make him take the land, and on 9th October, 1877, made a deed by way of grant, release, and quit claim, of the east half of the lot, to Dennis Pearson in fee.

On 1st January 1878, McKay made a deed in the ordinary statutory form to Dennis Pearson with ordinary covenants.

If, as in *Doe d. Curzon v. Edmonds*, the plaintiff had merely written, that, although he thought he could successfully resist the claim, he was still willing to take a lease from the other party as proposed, and nothing further was done, it might have been held that was not a sufficient acknowledgment under the statute.

As to the north part of the east half the evidence is not very clear.

McKay swears that he bought the land in 1873. There were no improvements on the north part. Richard Harman was just beginning to cut on part of the north part.

McKay bought on the 16th April, 1873.

This suit was commenced on the 9th August, 1883.

Whitney swears that this north-east quarter was wild till seven or eight years ago.

The law seems reasonably clear that if a plaintiff be in actual possession of premises, using them as his own, and another evicts him or enters upon his possession, the latter, unless he can prove title, must fail and plaintiff recover his possession.

The law is stated in such cases as *Shaver v. Jamieson*, 25 U. C. R. 156; *Wallbridge v. Gilmour*, 22 C. P. 135; *Asher v. Whitlock*, L. R. 1 Q. B. 1.

This is apart from any claim under the Statute of Limitations.

The peaceable possession is presumed to indicate a title in fee simple. No one can actually enter upon or disturb this except on proof of title.

If the premises had been abandoned or ceased to be occupied in any way "then, without any actual ouster or disseisin, a person enters and proves that prior to the plaintiff's entry he occupied claiming as owner, it would seem, in

Baron Parke's words," in *Brest v. Lever*, 7 M. & W. 593, "to amount 'to nothing more than a longer against a shorter possession, * * and for a period insufficient to convey any title':" *Wallbridge v. Gilmour*, 22 C. P. at p. 139. See also *ib.* at p. 140. See also conclusion of judgment of Gwynne, J., in *Thompson v. Bennett*, 22 C. P. 393.

All the defendants could do was to prove title under D. McKay. The latter could not prove title from S. Draper, under whom the Harmans entered. I therefore see no difficulty on this point.

As far back as 1872 R. Harman clearly became the plaintiff's tenant, and we have not before us either Draper, or any one in privity with him objecting thereto. Such objection could only apply to the south fifty acres.

As to the north-east fifty acres, it was only through and under the plaintiff that Harman entered.

The plaintiff was then in actual possession of the east half, and so remained till the defendant obtained possession through Kirke, the plaintiff's tenant.

I think what the defendant did clearly amounted to an entry on the plaintiff's possession—to an ouster and eviction.

As to the agreement with McKay, in 1875, it seems only to amount to this: "I will purchase from you, if you can shew title." The agreement could not possibly be enforced without proof of title. So here, if McKay could shew title, the defendant holding under him would probably defeat the plaintiff's claim.

On the evidence I hardly think the plaintiff could recover against the true owner on any title under the Statute of Limitations. As to the north fifty acres I doubt the sufficiency of the proof of any ten years occupation.

As to the south fifty acres, besides the difficulty as to getting Harman to become his tenant, as against the true owner proving title through Draper, he would probably find the acknowledgment contained in the agreement of 1875 with McKay to be fatal.

I give judgment for the plaintiff, with costs of suit, as to the east half, and award writ of possession and *fi fa* therefor, staying to the 5th day of May term.

It may be that defendant can get evidence to prove the deeds referred to in the abstract of title, and of which memorials were produced. If so the Divisional Court may allow another trial on terms.

During Easter Sittings, *W. S. Gordon* moved on notice to set aside the judgment for the defendant, and to enter judgment for the plaintiff; and he filed affidavits to the effect that since the trial certain ancient title deeds, namely, Beam to Lewis, and Lewis to Street, which at the trial were assumed to be lost, had been found and were now produced, they proving themselves; and affidavits of Donald McKay and Jane A. Keen, widow of Joseph Keen, stating that evidence had been recently discovered shewing that Henry S. Draper, who put Richard Harman in possession of the land, acted under a power of attorney from Joseph Keen, the owner of the lot, and was his agent in the management of the lot.

During the same sittings, June 9, 1884, *J. K. Kerr*, Q. C., and *W. S. Gordon* supported the motion. The finding of the learned Judge was that the plaintiff could prove neither a paper title nor a possessory title, and that he had admitted, under seal, the title of the defendants' grantor in 1875. The evidence shewed that the plaintiff did not put Richard Harman in possession of the lot, but that Keen, the defendants' grantor, did so, acting through his agent Draper. Harman was thus in possession as tenant of Keen years before the plaintiff knew the lot. Harman, not having got possession from the plaintiff, was at liberty at any time to dispute his title, and so could any persons to whom Harman gave the possession: *Smith v. Modeland*, 11 C. P. 387. The plaintiff's lease was forced upon Harman through false representations and menace, and was not registered, and defendant Pearson had no knowledge of it until this action was brought; it cannot avail to give plaintiff a possession as against defendants: The lands were until the past few years wild, and no knowledge was proved to the owners of the paper title of the plaintiff's alleged possession under R. S. O. ch. 108, sec. 4. The affidavit of Mrs. Keen proves that the Draper referred to in the evidence of the Harmans was Henry S. Draper, and that he had acted under a power of attorney from her husband, the then

owner. Mrs. Keen says she saw and read the power. Proper proof of this fact would establish that Richard Harman was holding for Keen, and was the tenant of Keen, the owner of the paper title, at the time plaintiff induced Harman to accept plaintiff's lease. The discovery of the ancient title deeds since the trial now removes all obstacles to the proof of a perfect paper title in the defendant from the Crown. They further referred to *VanVelsor v. Hughson*, 45 U. C. R. 252; *Regina v. Guthrie*, 41 U. C. R. 148; *Re Higgins*, 19 Gr. 303, 307; *Gough v. McBride*, 10 C. P. 166; *Hook v. McQueen*, 2 Gr. 490; *Nicholson v. Dillabough*, 21 U. C. R. 591; *Kyle v. Stocks*, 31 U. C. R. 47; *Armstrong v. Armstrong*, 21 C. P. 4; *Cahuac v. Scott*, 21 C. P. 551; *Fenner v. Duplock*, 2 Bing. 10; *Doe d. Radenhurst v. McLean*, 6 U. C. R. 530.

J. J. Maclaren and W. M. Merritt, contra. The defendant's paper title is still defective. The alleged deed from Beam to Lewis has not been proved. The memorial produced, executed by the grantee, is not sufficient, as it is not shewn that possession followed the deed. The case must therefore turn on the possessory title. The possessory title is clearly in the plaintiff. The plaintiff claims possession through Richard Harman, under the lease to him of the 6th October, 1872. The possession of Richard Harman as such tenant was clearly the possession of the plaintiff. The defendant attempts to set up that at the time Richard Harman took the lease from the plaintiff he was in fact the defendant's tenant, having, as is alleged, gone into possession under Simeon Draper, through whom the defendants claim they shew title; but the affidavits put in by the defendant disprove this, for they shew that it was Henry S. Draper, and not Simeon Draper, who put Richard Harman in possession. Moreover, the evidence fails to shew that Simeon Draper or Henry S. Draper ever had any title, or, if they had, that the defendant in any way claimed through them. The law is clearly laid down that the defendant cannot claim title by attornment from the plaintiff's tenant. They referred to *Woodfall's L. &*

T., 12th ed., p. 332; *Doe d. Hughes v. Dyeball*, 1 Moo. & M. 346; *Doe d. Knight v. Smythe*, 4 M. & S. 347; *Asher v. Whitlock*, L. R. 1 Q. B. 1; *Doe d. Miller v. Tiffany*, 5 U. C. R. 79; *Davison v. Ghent*, 1 H. & N. 744; *McGregor v. LaRush*, 30 U. C. R. 299; *Acre v. Livingstone*, 26 U. C. R. 282.

June 26, 1884. CAMERON, C. J.—Lot 17, the lot in question, appears by the evidence to have been granted by patent from the Crown to Phœbe Adair, on the twentieth day of May, 1801, and the lot runs nearly east and west, the course of the side lines commencing at the front of the concession at the east, being north 74 degrees, and the front and rear lines north, 9 degrees west, the length of the lot being 100 chains and the width 20 chains in the original plan.

Apart from the question whether the several conveyances, under which the respective parties claim title, were sufficiently proved, they shew that Phœbe Adair, in 1804, conveyed the whole lot to John Beam: that John Beam conveyed the east half of the lot on the 4th of June, 1831, to Daniel Lewis, not by the designation east half, but as a part of the lot, and by a special description by metes and bounds, which give an accurate description of the east half, and being precisely the same as the description by metes and bounds contained in the plaintiff's deed from John M'Lean, in the statement of claim mentioned. This gave the front half of the lot, which may otherwise be aptly described as the east half, or the north east and south east quarters. Thus supposing the deed proved, Daniel Lewis became the owner of the whole of the land in question in this action.

The first conveyance from him, which was to Samuel Street, and made on the 16th day of November, 1832, changes the description "east half," to "southerly half," but continues the description by metes and bounds contained in the deed from Beam to him. John Beam then, on the 7th of March, 1837, conveyed the north

plaintiff then gave an agreement for a lease to one George Kirk, of the east half of the lot, for five years. Kirk entered into possession under this agreement, which was dated 1st April, 1882, and on the 15th of June of the same year, at the request of Pearson, he took a lease of the land from him for five years, and remained in possession for about a year, when Pearson got him to give up possession to him.

Then Pearson by lease, dated 23rd of April, 1883, demised to the defendant Harman for five years, and the plaintiff on the 9th of August, 1883, brought this action.

There would thus appear to be no doubt that for several years before the defendant Pearson interfered with his tenant Richard Harman, the plaintiff was in possession of the land, and by reason of such possession the authorities cited by the learned Chief Justice are ample to shew that the plaintiff had such a title as enables him to maintain ejectment against anyone, who has, without a legal title, intruded upon such possession, apart altogether from any question as to whether the plaintiff has made out a good paper title, or a statutory title by length of possession, and apart from the question of the defendant having improperly obtained possession from a tenant of the plaintiff.

In *Asher v. Whitlock*, L. R. 1 Q. B. 1, at p. 5; Sir A. Cockburn, C. J., thus deals with the right that possession gives to any one not having actual title: "Mr. Merewether was obliged to contend that possession acquired as this was, against a rightful owner, would not be sufficient to keep out every other person but the rightful owner. But I take it as clearly established, that possession is good against all the world, except the person who can shew a good title; and it would be mischievous to change the established doctrine."

In *Doe d. Hughes v. Dyeball*, 1 Moo. & M. 346, one year's possession by the plaintiff was held good against a person who came in and turned him out; and there are other authorities to the same effect."

This statement of the law is accepted in our Court of

Queen's Bench, in *Shaver v. Jamieson*, 25 U. C. R. 156, and in this Court in *Wallbridge v. Gilmour*, 22 C. P. 135, and other cases.

The defendants have failed to shew title, as the proof of the conveyance from Beam to Daniel Lewis was not sufficient. The defendants attempted to establish this deed by production of the registered memorial, but this memorial purported to be executed by the grantee, and as possession did not accompany the conveyance, the case of *Van Velsor v. Hughson*, recently decided in the Court of Appeal, 9 App. R. 390, reversing the judgment of the Queen's Bench, 45 U. C. R. 252, on this point, though affirming the judgment in favour of the plaintiff, is an express authority against the sufficiency of such memorial as evidence in proof of the conveyance.

If this deed had been established, and the defendant's title traced to it, such title in the defendant would only extend to the south east quarter of the lot, and would leave the plaintiff's right by possession unimpaired as to the north east quarter, unless the special description would supersede the general, and, as to the quarter, the plaintiff would be entitled to recover. The defendant on the argument, produced the original deed from Beam to Lewis, which on proof that it came from the proper custody, being over thirty years old, would make out the defendant's paper title to the south east quarter, unless such title has been lost under the Statute of Limitations. The learned Chief Justice thought the plaintiff did not make out such a title, and I concur in this opinion.

The proof that the deed from Beam to Lewis came from the proper custody no doubt can be readily supplied, as it is said to have been found among the late Mr. T. C. Street's papers; and, if there were no other difficulty in the defendant's way as to the south east quarter of the lot, there ought to be a new trial granted on terms. But there is a very formidable obstacle to this course being pursued, presented by the fact that the defendant obtained possession of the land from the plaintiff's tenant, and the statute II Geo. 2 ch. 19,

s. 11, would seem to prevent a possession so obtained placing the party obtaining it in any better position than the tenant himself would have been in; and it is clear that if the tenant had acquired the fee by purchase from the true owner, he could not set it up against his landlord till after he had restored possession of the land to his landlord: *Pyatt v. McKee*, 3 O. R. 151, and cases there cited.

I am of opinion if the defendant Pearson were suing to recover possession of the south half of the lot, and not the east half, the agreement between the plaintiff and Donald McKay, by which the plaintiff agreed to buy from McKay the south half of the lot, would entitle the defendant, on proof of McKay's title being vested in him, to recover without further proof of title. But I am of opinion that on the whole case that the plaintiff's judgment must be allowed to stand, and the defendant's motion be dismissed. To prevent this judgment working an estoppel against the defendant under the Judicature Act, in any action he may bring to assert title in himself, there must be added to the finding in favour of the plaintiff, that the plaintiff was so entitled to recover possession by reason of the defendant Pearson having obtained possession of the land from a tenant of the plaintiff, and not by reason of his having proved a title otherwise than by his possession through his tenant, and this finding is not to estop the defendant from disputing the plaintiff's title, and shewing title in himself, in any action that he may bring to recover possession of the land.

There has been no case made out upon the evidence to shew that Henry S. Draper, under whom Harman first entered in 1870, had any title, or, if he had, to connect such title with the defendant, and so no case to make out that the plaintiff was himself a wrong doer as against Harman's first landlord, that can be evoked in aid of the present defendants.

The defendants have filed an affidavit made by Donald McKay, to the effect that Henry S. Draper acted as agent for Joseph Keen, from whom he, McKay, purchased the

land : that he was aware of this at the trial, but did not inform the plaintiff of it. And Jane A. Keen, widow of Joseph Keen, makes an affidavit also to the effect that Henry S. Draper was an agent of her husband in the management of the lot. But all this can be shewn in an independent action to be brought by the defendant, who made his arrangements behind the back of the plaintiff with the plaintiff's tenant to get possession, without, if McKay's affidavit be true, knowing or caring how Harman had got into possession originally. I think he should be allowed to make out this case, as he would have had to have done without the aid of possession in his favor, if he had not succeeded in getting possession from Harman, and afterwards from Kirk, who certainly went in under the plaintiff. The defendant Pearson, in an affidavit filed on his behalf, setting forth the chain of title under which he claims, states that the executors and trustees of Thomas C. Street executed a deed to him, the defendant, of the east half of the said lot, which he alleges was put in at the trial, but it does not appear now among the exhibits, a list of which has been prepared by the clerk.

The use of the description, southerly half, first appears in the deed from Lewis to Samuel Street, so that a deed of confirmation from the executors and trustees of Thomas C. Street does not cure the defect in defendant's title unless the description southerly half is subordinate to and can be controlled by, the description by metes and bounds, which may be a question that it may be necessary to decide, should the defendant in his turn become plaintiff, and one upon which the authorities are not uniform. If the southerly half can be held, on account of the metes and bounds describing the east half, to be the east half, it is difficult to see why the north west half with the same metes and bounds, may not be the east half, and if it were so held, this injustice would be done, that the plaintiff would take nothing by his deed, as it is in point of time later than the title through which the defendant claims the land thus described. But these questions can be better

disposed of when the two titles are in evidence before the Court more fully than they are now.

GALT, J., concurred.

ROSE, J., having been engaged in the case while at the bar, took no part in the judgment.

Motion dismissed.

[COMMON PLEAS DIVISION.]

MOFFATT V. SCRATCH.

Crown grant—Surrender, evidence of—Tax sale.

Certain land was granted by the Crown to W., but subsequently, in consequence of an alleged surrender of the land to the Crown, a new grant was made by the Crown to the defendant's vendor. After the issue of W.'s patent, and before the alleged surrender, the land was sold for taxes. The only evidence of the alleged surrender was an endorsement on the back of the first patent, which stated that the land was surrendered by one M., "the attorney mentioned in the annexed power," but no power of attorney was produced, and the surrender was signed by M. as principal, and not as attorney for any named principal. *Held*, in ejectment, that the alleged surrender was not proved, and, therefore, the plaintiff claiming under the tax sale was entitled to recover the land as against the defendant claiming under the second patent; but the defendant having made improvements believing that he had a title, a reference was directed as to how much the value of the land had been enhanced thereby.

EJECTMENT to recover possession of lot No. 16, in Con. A., Township of Mersea, in the County of Essex.

J. H. Ferguson, for the plaintiff.

Morton (of Sandwich), for the defendant.

The cause was tried before Burton, J. A., without a jury, at Sandwich, at the Spring Assizes of 1884, who delivered the following judgment:

July 9, 1884. BURTON, J. A.—This was an action of ejectment by a person claiming under a tax title for taxes a portion of which accrued due at a time when the lands, which had been granted to one Isabella Wigle, still remained vested in her, although it is claimed that the lands were subsequently surrendered to the Crown.

The defendant claims under grant from the Crown to his vendor in 1868.

It was proved at the trial that the lands in question were, by Order in Council, dated 30th January, 1808, directed to be granted to the said Isabella Wigle, wife of Wyndall Wigle, daughter of one Leonard Scratch an U. E. Loyalist, and were so granted on the 19th June, 1818.

It was further shewn that among the records of the office of county treasurer, was a return from the surveyor-general's office, dated 24th June, 1820, of all lands granted or located in the then Western District, in which this lot is mentioned as having been granted to Isabella Wigle.

The proceedings of the Quarter Sessions, the order for the sale, shewing taxes in arrear from January, 1820, to July, 1828, were also shewn, and a warrant, dated 19th October, 1829, from the clerk of the peace to the sheriff authorizing the sale of, among other lands, the land in question for arrears amounting to £3 5s. 0d., under which the lands were sold to one Peter Scratch, through whom the plaintiff claims. The title was duly proved through several mesne conveyances to the plaintiff.

Objections were taken by the counsel for the defendant to the sufficiency of the proof of the preliminary steps leading up to the sale for taxes. But without enquiring very particularly into the nature of the objections, I think, if any exist, they are cured by the Act of 1869, the tax purchaser having paid taxes for more than eight years subsequent to the sale.

The defendant then put in an exemplification of the patent to Isabella Wigle, which contained a memorandum endorsed to the effect that Andrew Mercer, the attorney named in the annexed power, surrenders unto our

Sovereign Lord the King the lands referred to in the patent. It is dated 6th September, 1826, and is signed by Mercer in his own name, not as the attorney of any named principal, and no power of attorney is produced.

I deferred judgment in order that these missing documents might be looked up and produced if possible. But unless a distinction can be drawn in the case of a surrender to the Crown, the instrument itself would seem insufficient to pass any estate, and I stated that as my view of the case at the trial. No additional papers have been produced, and I think I must hold that no surrender has been established. I have not thought it necessary therefore to consider what would have been the remedy of the plaintiff, if the land had reverted to the Crown, under a sale made for taxes in 1832.

The defence of the Statute of Limitations fails ; and I direct judgment for the plaintiff, with costs ; but, being of opinion that the defendant made his improvements in the *bond fide* belief that he had a good title, I direct a reference to the Master to ascertain the amount by which the value of the land has been enhanced by such improvements.

[COMMON PLEAS DIVISION.]

QUILLINAN ET AL V. THE CANADA SOUTHERN RAILWAY
COMPANY AND THE MUNICIPAL CORPORATION OF THE
TOWN OF NIAGARA FALLS.

*R. W. Co.—Pleading—Allegation that work “negligently” done—
Mandamus—Compensation.*

The plaintiff in his statement of claim claimed damages from the defendants for “unlawfully, negligently and wrongfully,” depressing certain streets in a town and thereby making it inconvenient and almost impossible for persons to approach the plaintiff’s store for business : also for, in like manner, blocking them up, and rendering them almost impassible in the neighbourhood of the plaintiff’s store, and thereby “negligently, unlawfully, and wrongfully,” preventing customers or others coming thereto, and almost entirely destroying the plaintiff’s business. The statement further claimed that if the depressing and blocking up should be found to be lawful, a mandamus should be granted requiring the defendants to proceed to arbitrate to ascertain the compensation payable to plaintiff : or that it be referred to the proper officer to ascertain and state such compensation.

Held, on demurrer, that the statement of claim was sufficient ; for it alleged that the work was negligently done, and this gave a cause of action, even though the work itself might be lawful.

Quære, whether a mandamus would be granted ; for if the plaintiff was entitled to compensation the proper remedy would apparently be by reference to the proper officer, as asked by way of alternative relief, also whether it is necessary to allege that defendants railway touches or takes a portion of plaintiff’s land ; and whether also, under the Railway Acts, defendants are liable to make compensation except for lands taken. As to the latter points, as the judgment could not be reviewed until after the trial, they were enlarged before the Judge thereat.

THE statement of claim alleged that the plaintiff owned a parcel of land on the north-east corner of Clifton avenue and Park street in the town of Niagara Falls, whereon was situated a dwelling house and store, in which the plaintiffs lived and carried on a very successful business, Clifton Avenue being one of the principal highways by which farmers and other customers enter the town, the store being well situated for business purposes. The Railway Company, a company duly incorporated, &c., and carrying on business as a Railway Company, was constructing a branch railway passing through the town, and built bridges on Clifton Avenue and Park Street ; and their co-defendants unlawfully and wrongfully permitted the said

Railway Company to depress the said streets, and the Railway Company unlawfully, negligently, and wrongfully depressed the same, and made it inconvenient and almost impossible for persons to approach the plaintiffs' store for business purposes; and the plaintiffs were thereby greatly injured. The said company also for many months negligently, unlawfully, and wrongfully blocked up, and rendered almost impassable Clifton Avenue and Park Street in the neighbourhood of the plaintiffs' store, and thereby negligently, unlawfully, and wrongfully prevented customers or other persons coming to the plaintiff's store, and almost entirely destroyed the plaintiffs' business. The plaintiffs' property has been permanently depreciated in value by the said unlawful, negligent, and wrongful acts of the defendants, and they have been greatly damaged by the loss of business occasioned thereby as aforesaid. The plaintiffs have frequently applied to the defendants for compensation for the injury and damages sustained by them as aforesaid, but they refuse to compensate the plaintiffs therefor.

The statement of claim further alleged that in case it should be held that the depression by the defendants of Clifton Avenue and Park street, and the blocking of the same as aforesaid, were lawful acts on the part of the Railway Company, and authorized by their statutory powers in that behalf, the plaintiffs, as alternative relief, claim a mandamus ordering the said company to proceed by arbitration in the manner provided by the statutes in that behalf, to ascertain the compensation properly payable to the plaintiffs for the injury and damage sustained by them through the exercise by said company of their said powers; and the plaintiffs will submit on their part to such arbitration proceedings, and will do all things required to be done by them in that behalf. The plaintiffs allege that the usual and convenient access to and from their said property from and to Clifton Avenue and Park street has been permanently interfered with, and rendered more difficult and inconvenient, and the value of such property has

been lessened by the depression of Clifton Avenue and Park Street, and by the exercise of the said Railway Company of their said powers, and the plaintiffs have been greatly damaged by reason thereof. The plaintiffs claim \$5,000 damages.

The defendants, the Railway Company, demurred to the statement of claim, on the grounds :

1. The cause of action rests on the allegation that the defendants unlawfully and wrongfully did the acts complained of, but, it being admitted in the plaintiffs' statement of claim that the defendant company was duly incorporated as a railway company, and that the defendant municipality gave them permission to occupy the streets, and as a matter of law the railway company having power to cross highways, and the general jurisdiction over the same being in the defendant municipality, it will be presumed that the defendants were entering lawfully, unless the plaintiffs allege, as a matter of fact, in what particulars the acts of the defendants were illegal and unlawful.

2. As to a mandamus, it is not alleged that a demand has been made on the defendants to arbitrate, which demand would be necessary to entitle the plaintiffs to a mandamus as asked for.

3. Further that the plaintiffs do not allege that any of their land has been touched or taken by the defendants, the company.

4. And that the railway company is not bound, under the statutes relating thereto, to make compensation to land owners, except where land is actually taken from them.

On June 17, 1884, *Kingsmill* supported the demurer.

Lash, Q. C., contra.

July 11, 1884. ROSE, J.—This is a demurrer by the defendants to the plaintiffs' statement of claim.

The plaintiffs claim damages from the defendant company for "unlawfully, negligently, and wrongfully"

depressing Clifton Avenue and Park Street, and thereby making it inconvenient and almost impossible for persons to approach the plaintiffs' store for business. Also, for "negligently, unlawfully, and wrongfully blocking up and rendering almost impassable the same streets in the neighborhood of the plaintiffs' store, and "thereby negligently, unlawfully, and wrongfully preventing customers or other persons coming to the plaintiffs' store, and almost destroying the plaintiffs' business."

The claim also is that, if the depression and blocking up be found to be lawful, the defendants may be ordered by mandamus to proceed to arbitrate to ascertain the compensation properly payable to the plaintiffs, or that it be referred to the proper officer of the Court to ascertain and state such compensation.

The demurrer of the defendants is (1) that the plaintiffs should allege in what particulars the defendants' acts were "illegal and unlawful."

2. That to entitle the plaintiffs to a mandamus a demand and refusal should be alleged.

3. That the plaintiffs should allege that the defendants' railway touches or takes a portion of the plaintiffs' land.

4. That under the Railway Act the defendants are not liable to make compensation except for lands taken.

It seems to me that the first ground of demurrer fails. The pleader in drawing the demurrer either intentionally or inadvertently makes no reference to the word "negligently" in the claim. Even lawful work negligently done causing damage gives rise to an action. The statement of claim is apparently drawn with reference to *Brine v. Great Western R. W. Co.*, 31 L. J. N. S. Q. B., p. 101, and is, in my opinion, in that respect sufficient. If the defendants required better particulars to enable them to prepare their defence they should have applied in Chambers in the usual way, and not have demurred. See also, as to negligence in the doing of an otherwise lawful act: *Thompson on Negligence*, p. 569. The defendants cannot rely on statutory rights and powers where the allegation is negligent construction.

As to the second ground, I hardly think the plaintiffs are entitled to a mandamus, even if entitled to compensation. To obtain a mandamus it is apparently clear a demand and refusal must be shewn: *High's Extraordinary Legal Remedies*, sec. 13. The remedy would be by a reference to the proper officer of the Court, as asked for by way of alternative relief. To this the plaintiffs would probably be entitled, if they made out a case at the trial for compensation. See *Scanlon v. London and Port Stanley R. W. Co.*, 23 Gr. 559, especially p. 565; *Malloch v. Grand Trunk R. W. Co.*, 6 Gr. 348.

"Since the object of a mandamus is not to supersede legal remedies, but rather to supply the want of them, two pre-requisites must exist to warrant the Court in granting this extraordinary remedy: first, it must appear that the relator has a clear legal right to the performance of a particular act or duty at the hands of the respondent; and, second, that the law affords no other adequate or specific remedy to secure the enforcement of the right and the performance of the duty which it is sought to coerce." *High's Extraordinary Legal Remedies*, p. 13, sec. 10.

This is, however, not the material question sought to be raised by the demurrer.

The remaining grounds raise the important questions relied upon by the defendants.

As my opinion cannot be reviewed until after the sittings of the Court for trials; and as, in my opinion, the defendants fail on their first ground of demurrer the case must go down for trial. I think it will be better for all parties that I should enlarge the hearing of the second, third, and fourth grounds of demurrer to the trial. I do this the more readily, as I understand the same question has been argued before Wilson, C. J., in *West v. Corporation of Parkdale (a)*, now standing for judgment. It may be at the trial the questions may disappear when the facts are fully disclosed in evidence.

(a) Judgment has since been delivered, but the case is not yet reported.

The question is an interesting one, and, if fairly raised on the facts, is entitled to receive the most careful consideration. If it comes up for further discussion and decision, I will be able to consider it with the assistance, not only of the opinion of the learned Judge at the trial, but also of the other members of this Court.

The leading case cited on the argument as to this was *Caledonian R. W. Co. v. Walker's Trustees*, 7 App. Cas. 259, especially 276. See also *Hammersmith R. W. Co. v. Brand*, L. R. 4 H. L. 171, at p. 213; *Hardcastle on Statutory Law*, p. 84-5.

If the plaintiffs succeed at the trial they should have the general costs of the demurrer. If they fail there should be no costs of the demurrer to either party.

Judgment accordingly

[COMMON PLEAS DIVISION.]

RE JOHN MILLOY AND THE MUNICIPAL COUNCIL OF THE
TOWNSHIP OF ONONDAGA.

By-law—Animals running at large—Unreasonableness—Mode of enforcing penalty—Indians and Indian lands—Quashing amending by-law after lapse of year from original by-law.

By-law No. 84, passed by the township of Onondaga on 29th May, 1882, prohibited certain animals therein named running at large; and provided that, *except between the 10th May and the 1st December in any year*, it should not be lawful for the owners of any other animals, not theretofore mentioned or indicated, to allow or permit the same to run at large. A fine or penalty not exceeding \$5.00 was imposed for every offence, but the animals were not thereby to be relieved from the operation of any by-law relating to pounds or pound keepers, or for any trespass or damage committed or done by them through their being permitted to run at large. The recovery of fines and penalties, (not adding the words "and costs,") was directed to be under sec. 421, *et seq.*, of the Summary Convictions Act, with imprisonment, in the event of no distress, unless the fine or penalty and costs, including costs of commitment, be sooner paid. By-law No. 97, passed on 9th July, 1883, after reciting that the object was to prevent all animals of any age or description running at large at all seasons of the year, amended by-law No. 84, by striking out the words in the words in italics. A motion to quash by-law 97 was made within a year after its passing, but after the lapse of a year from the passing of by-law 84.

Held, that the by-law was not oppressive or unreasonable as extending to all seasons of the year, in that it was no wider than the statute under which it was passed, Municipal Act, 1883, sec. 492, sub-sec. 2.

It was objected that the provisions in by-law 84, as to the levying fines was *ultra vires*, because that section of the Act provided a mode of recovery, *i. e.*, by sale of the animals impounded, and hence that sec. 421 *et seq.*, did not apply; but *Held*, that the objection was taken under a misconception of fact, in that the by-law was not and did not profess to be a pound by-law; and it was by no means clear that these sections would not apply to a pound by-law.

Quære, as to the effect of the omission of the words "and costs" in the clause providing for the penalty; but as this was not taken in the rule, it was not considered.

It was also objected that the by-law should have been limited in its provisions so as not to extend to Indian lands within the township, but the learned Judge refused to quash on this ground (1) because the quashing a by-law is not imperative but discretionary; (2) and if it were quashed the original by-law would remain; (3) it could only be quashed as to Indians and Indian lands; (4) the applicant was not prejudiced, and this was not a substantial objection; and (5) the Indians who were alone affected were not complaining.

The cases in which an amending by-law may be moved against after the expiry of a year from the passing of the original by-law considered.

On June 20th, 1884, *H. T. Beck* obtained an order *nisi* to shew cause why by-law No. 97, of the township of

Onondaga, should not be quashed with costs, upon the grounds—

1. That the amendment made by said last mentioned by-law is unreasonable and *ultra vires*, in that it prohibits the running at large in the township of Onondaga of all animals of any age or description at all seasons of the year.

2. That by-law No. 84, as amended by by-law No. 97, is unreasonable and *ultra vires*, in that section 5, as amended, imposes an absolute and unconditional duty on the owners of all animals to prevent the same from running at large.

3. That said by-law as amended is *ultra vires* and unreasonable, in that section 6 imposes a penalty upon all persons having the charge, care or control of any animals, whether as owners or otherwise, who shall permit or suffer the same to run at large.

4. That subsection 2 of section 492 of the Consolidated Municipal Act, 1883, makes special provision for levying all damages, fines, and expenses from a sale of the animals in question in case of a breach of any by-law passed under the provisions of the said subsection, and the municipality have no power to collect fines under the provisions of section 421 and following sections of said Act.

5. The Municipal Act gives a remedy *in rem* merely, and not *in personam*.

6. That by-law No. 84, as amended by by-law No. 97, is ambiguous, and the first five sections are inconsistent with section 5 as amended.

7. That the said municipality had no jurisdiction over the Indian lands situate in the said township, and the said amended by-law should limit its provisions so as as not to extend to said lands, or in any way affect anything done or permitted thereon.

On June 27, 1884, *V. Mackenzie*, Q. C., supported the order.

Wilson, Q.C., contra.

July 16, 1884. ROSE, J.—This is a motion to quash by-law 97 of the township of Onondaga.

This by-law amends section 5 of by-law 84. By-law 84, by section 1, repeals previous by-laws; and, by sections 2, 3 and 4, prohibits the running at large of certain animals therein named, and, by section 5, provides "*That except between the 10th day of May and the 1st day of December in any year it shall not be lawful for the owners of any other animals, not hereinbefore mentioned or indicated, to allow or permit the same to run at large.*"

Section 6 enacts, "That all persons having the charge, care or control, whether as owners or otherwise, of any animals hereby prohibited from running at large, who shall permit the same to run at large contrary to the provisions hereof, shall be liable to a fine or penalty for every such offence of not exceeding \$5: and the imposition of any such fine or penalty shall not relieve such animals themselves from the operation of any by-law of the said township relating to pounds or pound keepers, for or on account of any trespass or damage committed or done by them by reason of their being so permitted and suffered to run at large."

The 7th section provides for the recovery of fines or penalties (not adding the word "costs," as in the statute), under the Summary Convictions Act; and, in the event of no distress, for imprisonment not exceeding twenty-one days, "unless such fine or penalty and costs, including costs of committal, are sooner paid.

It will be observed that neither in sections 6 or 7 are costs provided for, so that the word "such" has nothing to which it refers as to the costs. I will refer to this hereafter.

Section 8 provides for the informer giving evidence, and is a copy in part of sec. 404, R. S. O. ch. 174, omitting the clause as to wife or husband giving evidence.

This by-law was passed on the 29th of May, 1882.

By-law 97, passed on the 9th of July, 1883, amends by-law 84 by striking out from section 5 the words which I

have italicised. It recites that the object is "to prevent all animals, of any age or description, from running at large at all seasons of the year."

The grounds of the motion may be said to be three. The main one is: 1. That it is oppressive and unreasonable, as extending to all animals at all seasons of the year.

2. That the provision as to levying of fines is *ultra vires*, as subsection 2, section 492, provides a mode of recovery, *i. e.*, by sale of the animals impounded; and hence the provisions of section 421 do not apply.

3. That the by-law should have been limited in its provisions so as not to extend to the Indian lands within the township.

As to the first ground. The words of the statute are (sec. 492, subsec. 2, Municipal Act, 1883), "For restraining and regulating the running at large or trespassing of *any animals*;" also, "providing for impounding them:" and then follows, "and for causing them to be sold in case they are not *claimed* within a reasonable time, or in case the damages, fines and expenses are not paid according to law.'

It will thus appear that the section provides for two things: restraining and regulating, and impounding.

The by-law we are considering does not provide for impounding, but for restraining and regulating.

The amending by-law is not a new enactment of all the provisions of the amended by-law. They remain as at first enacted, save in so far as amended. Clause 5 is alone affected. It is clear by-law 84 cannot be moved against, more than one year having elapsed since it was passed. If I am bound to quash by-law 97, by-law 84 will remain unaffected, save that clause 5 will be restored to its original condition.

It seems to me an amending by-law may be moved against after the expiry of a year from the passage of the original by-law:

1. When the original by-law is *intra vires*, but by the amendment is made *ultra vires*, or so objectionable as to demand the interference of the Court.

2. When the original by-law is objectionable, and the amending by-law extends its objectionable provisions to new objects, new territory, or over a further period of time.

Where, however, the original by-law is objectionable, and the amending by-law limits its application or makes some immaterial verbal alteration, it seems to me the Court should not interfere, as the party moving has lost his right to take the objection as against the old by-law.

To illustrate: If by-law 84 had restrained the running at large of oxen, and had contained clauses which were *ultra vires*, and the amending by-law had extended these provisions to all animals, the amending by-law should be quashed. If, however, by-law 84 restrained all animals, and the amending by-law limited it to oxen only, then the year having elapsed, in my opinion, the amending by-law should not be quashed.

There are, no doubt, other considerations, which from time to time will arise; but the above are sufficient for the present motion.

The amending by-law here extends the period of time during which all animals are restrained from running at large, so as to cover the whole year instead of about five months.

No evidence has been offered that this is unreasonable, and no authority cited. I do not see that it is necessarily so. I think it may be reasonable. The statute is unlimited in its language, both as to time and animals—"any animals."

It was urged that this would apply to the smallest animals and the youngest. The enacting words of the by-law are not wider than the statute, and I must not allow a lively imagination to place a limitation on the power of the municipality that the Legislature has not seen fit to impose. If the municipality should attempt to enforce the provisions in an unreasonable manner, the Court could interfere.

I think this ground fails.

As to what is a domestic animal, see *Budge v. Parsons*, 3 B. & S. 382.

As to the second objection, so far as this is open on this motion, I think it is taken under a misconception of the effect of subsection 2. I have endeavoured to point this out by the mode of division above. This is not a pound by-law, nor does it profess to be; and while I am clear that the provisions of sections 421 to 428 apply to the provisions of this by-law, I by no means say they would not apply to a by-law respecting pounds. It will be time enough to examine this question when it arises.

I think this ground also fails.

I hardly see why clauses 6, 7 and 8 were enacted. Sections 421 *et seq.* cover the ground taken; and in drafting clause 7 of the by-law, as I have above pointed out, the provisions as to recovering and enforcing the fines and penalties "with costs" has been omitted.

It will be observed that section 421 only applies, "unless where other provision is specially made" therefor.

This objection is not taken in the order *nisi*, and I do nothing more as to it than to call the attention of the corporation to the possible difficulty of enforcing the payment of the costs, under the language of the by-law. The question would be a more serious one on a motion to quash a conviction.

The third objection has given me some little anxious thought.

Under the British North America Act, "Indians and lands reserved for Indians," are among the subjects over which the authority of the Dominion Parliament extends.

The Indian Act, 1880, sec. 74, provides that, "The chief or chiefs of any band in council may frame, subject to confirmation by the Governor-in-council, rules and regulations for the following subjects:

5. The prevention of trespass by cattle; also for the protection of sheep, horses, mules, and cattle.

8. The establishment of pounds, and the appointment of pound keepers.

The Indian reserve pointed at in the third objection is said to be within the township of Onondaga. The lan-

guage of the by-law is general, and in terms applies to all persons within the township. This is a defect. See *Lumley on By-laws* (1877) p. 70; especially *Mayor, &c., of Guildford v. Clark*, 2 Vent. 247.

Referring to the report in that case, we find as follows :

"The by-law is said to have been : That if any inhabitant should be chosen ; whereas they cannot make by-laws to bind all the inhabitants of the town, but only the freemen or members of the corporation." There was a second ground taken, and the report proceeds : "And the Court held these matters incurable." See also *Lumley on By-laws*, p. 86 : "The law must not be made in respect of a matter not within the authority of the body enacting it, nor to operate upon persons or in a district not subject to their control. In technical terms, it must not be *ultra vires*." Also pp. 148 to 156 inclusive.

I think, however, I need not determine this question, for the following reasons :

The quashing of a by-law is not imperative, but discretionary. Among other cases collected in *Rob. & Jos. Digest*, pp. 2469-2471, see *re Platt and Corporation of Toronto*, 33 U. C. R. 53, 58; *McKinnon and Corporation of Caledonia*, 33 U. C. R. 502, at p. 507.

2. If I should quash this by-law, the original by-law remains.

3. If I gave effect to it at all, I should quash it only as to the Indians and Indian lands : see *re Morell v. City of Toronto*, 22 C. P. 323.

4. The applicant cannot be affected, as it cannot in any way prejudice him; and this is not the substantial objection to the by-law.

5. The Indians, who alone could be affected, are not complaining, nor is it stated that any annoyance is or has been experienced from its existence.

While I do not quash it, I would suggest that the corporation consider whether the objection is not one which it might very easily remove. It may affect other by-laws, and cannot be ignored on a motion to quash a conviction.

It was said on the argument that this amending by-law was passed in opposition to the petition of a majority of the ratepayers. This is no ground for quashing it. If the ratepayers are not satisfied with their councillors, the remedy is in their own hands. The Courts cannot interfere.

The order must be discharged, with costs.

I have derived much assistance in considering the questions as to the effect of amending by-laws or statutes from Mr. *Sedgwick's* work on the Construction of Statutory and Constitutional Law, 2nd ed., p. 68, and note to p. 162, as to the relation back to the time of original Act; notes to pp. 95; and 96, as to how far an amendment acts as a repeal notes to pp. 110 and 111, as to effect of repealing prior statutes.

I make reference to this work, as he was the only author I found who had given special attention to the subject of amending or amendatory statutes.

Order discharged.

[COMMON PLEAS DIVISION.]

DOUGLAS V. HUTCHINSON.

Married woman—Dower—Separate estate.

A married woman married to her present husband in 1871, was entitled to dower in land of which her former husband died seized, and was living thereon with her husband working it; but her dower had never been actually set apart or assigned.

Held, that this was separate estate, with reference to which she could contract debts or which she could contract to sell or dispose of; and that it could therefore be sold under a *f. fa.* on a judgment recovered on a promissory note made by her.

ACTION on a promissory note for \$400 made by the defendant to the plaintiff.

Defence: Coverture.

Replication: that the defendant had, at the time of contracting the debt for which the note was given, and still has, separate estate in the Province of Ontario, in which her husband has no legal or equitable interest, and that she contracted with the plaintiff, and made the note, in reference to and to make her separate estate liable to be sold to pay the note, if not paid at maturity, and the plaintiff took the note from her relying upon the security of her separate estate to pay it.

The case was tried before Osler, J. A., without a jury, at Walkerton, at the Fall Assizes of 1883, when the learned Judge found a verdict for the plaintiff, with a reference to the County Court Judge of the county of Walkerton, under sec. 47 of the O. J. Act, to ascertain and report whether the defendant had at the time of making the said note any separate estate, and the nature thereof.

On September 6th, 1884, the learned County Court Judge made his report, whereby he found that the defendant had no separate estate; but, at the special request of counsel, he reported that the defendant was married to Andrew Hutchinson on the 2nd November, 1871, without a marriage settlement, and had lived with him from that date to the present time: that the said defendant was

previously married to one Neil McPhail, who died in 1870 intestate; that the said McPhail died owner in fee of a lot of land (describing it): that at the time of her marriage to Andrew Hutchinson the defendant was entitled to dower in the said lot: that said dower was never assigned nor set apart, and that the said defendant never sold her dower, and was with her said husband living on the said land and working it.

From this report the plaintiff appealed.

On September 26, 1884, *Shepley* supported the appeal.
W. H. P. Clement contra.

October 17, 1884—OSLER, J. A.—The defendant is entitled to dower in land of which her former husband died seized. She is living on the land with her present husband, but her dower has not been actually set apart or assigned.

I follow the decision of my Brother Proudfoot, in *Allen v. Edinburgh Life Assurance Co.*, 25 Gr. 306, the latest case on the subject, and hold that her right to dower is exigible in execution, and is such an interest in land as can be sold under a *fi fa.* on a judgment recovered against her in this action.

I think the fact of her subsequent marriage makes no difference. She was married in 1871, and, therefore, comes within the class of married women mentioned in section 3 of the Married Women's Act, R. S. O. Ch. 125, which enacts that every married woman married between the 2nd May, 1859, and the 2nd March, 1872, and without any marriage certificate or settlement, "shall and may, notwithstanding her coverture, have, hold, and enjoy all her real property, whether belonging to her before marriage or acquired, * * in any other way after marriage, free from the debts and obligations of her husband, and free from his control or disposition, without her consent, in as full and ample a manner as if she continued sole and unmarried."

I do not see that full effect is given to the wide language of this section if it be not held that the property which a married woman takes under it is subject to execution for her debts. Her husband has no rights or interest in it. The rents and profits she derives from it are her own, and to say that it is not separate estate with reference to which she can contract debts, or contract to sell or dispose of it, is to place a limitation on the language of the section which I think no reported decision since the passage of the Revised Statutes obliges me to do: *Boustead v. Whitmore*, 22 Gr. 222; *Horner v. Kerr*, 6 A. R. 30; *Ingram v. Taylor*, 7 A. R. 216.

Therefore I allow the appeal from the report of the Judge of the County Court, and direct judgment for the plaintiff to be enforced against the defendant's interest as dowress in the lands mentioned in the evidence returned with the report.

[CHANCERY DIVISION.]

GRASETT V. CARTER.

Motion to commit—Revivor of case in appeal—Service of certificate of Supreme Court—Specific acts of disobedience of an injunction—Mandatory injunction.

On a motion to commit a defendant for non-compliance with a decree which contained this clause : " And this Court doth further order and decree that an injunction be awarded to the plaintiff perpetually restraining the defendant, his servants, workmen, and agents from trespassing upon the lands of the plaintiff in the pleadings mentioned," the trespass complained of being two walls built by the defendant on four inches of the plaintiff's land, it was objected : 1. That the suit was revived while pending in the Court of Appeal by an order issued from the Division of the High Court of Justice appealed from. 2. That no certificate of the Supreme Court (which had in substance affirmed the decree) had been served ; and 3. That the notice of motion did not specify the acts of disobedience. It was

Held, that the suit was properly revived : that it was not necessary to serve the certificate of the Supreme Court when the decree was not materially altered, and when the defendant well knew that the decree would be enforced ; and that when (as in this case) a correspondence had shewn the defendant what acts were complained of, it was not necessary to repeat them in the notice of motion ; and the objections were overruled.

Held, also, that under the form of the decree, the plaintiff was entitled to have the walls removed, and if the defendant did not remove them within a month the order must go.

THIS was an application in a suit of Sarah Maria Grasett against John Carter to commit the defendant for (as set out in the notice of motion) " disobedience to the decree made in this cause, and for breach of the injunction awarded to the plaintiff by the said decree restraining the defendant from trespassing upon the lands of the plaintiff in the pleadings mentioned, to wit, lot No. 9 in the pleadings mentioned."

The bill was originally filed by the Very Reverend Henry James Grasett, and—after setting out (amongst other allegations) that he was the owner of lot No. 9, and the defendant was the owner of lot No. 8, two adjoining lots on Simcoe Street in the city of Toronto ; and that James Alexander Temple, who had previously owned said lot No. 9

had built a house thereon, the south wall of which was on the boundary line between said lots—alleged in paragraphs 13 and 14 as follows :

“ 13. The defendant has now commenced to erect walls commencing at the front of the southerly wall of the plaintiff's building, and extending easterly towards Simcoe Street and the front of said lot 9 ; and also commencing at the rear of the plaintiff's said southerly wall, and extending westerly towards the rear of the said lot No. 9, both of said walls being upon the said four inches (a). And the plaintiff charges, and the fact is, that the said walls are being erected upon his said lot, and that the said acts of the defendant are and constitute trespass upon the plaintiff's land.”

“ 14. The plaintiff has notified the defendant to desist from his said trespass, and to discontinue the erection of the said wall, but he has refused and still refuses to do so, and he will, unless restrained by the order and injunction of this Honorable Court, continue his said acts.”

The defendant in his answer, after alleging that he had always claimed the four inches from the time that the said Temple began to build his wall, and that Temple was aware that he did, set out in paragraph 9 of his answer as follows :

“ 9. I admit that I have erected a wall upon the northern boundary of the land claimed by me, and that I have built on the four inches in dispute to the east and west of the plaintiff's wall ; but I am not thereby interfering with the south wall of the plaintiff's house, and have no intention of injuring the same.”

The injunction clause in the decree was as follows :

“ And this Court doth further order and decree that an injunction be awarded to the plaintiff perpetually restraining the defendant, his servants, workmen, and agents from trespassing upon the lands of the plaintiff in the pleadings mentioned.”

(a) The defendant's contention was, that the south wall of the said house was four inches over the boundary, and to that extent on his lot, and that was the four inches in dispute.

Upon this decree a writ of injunction was issued and served.

The decree contained a declaration that the outside limit of the southerly wall of the plaintiff's house produced easterly and westerly was the southerly boundary of his lot 9, and it proceeded to describe the course of this boundary as laid out by a surveyor. The Court of Appeal reversed the decree, and dismissed the bill.

On appeal to the Supreme Court of Canada the judgment of the Court of Appeal was reversed, and the decree affirmed, but that Court amended the decree by striking out the words describing the boundary line as laid out by the surveyor, on the ground that his survey had not been made under the authority of the Court. The decree, however, was not substantially altered thereby.

While the case was standing for judgment in the Court of Appeal the original plaintiff died, and the suit was revived in the name of the present plaintiff by an order taken out by the plaintiff's solicitor in the Chancery Division. This order was never moved against.

The original decree had been served upon the defendant, but the certificate of the judgment of the Supreme Court, though entered in the books of the Chancery Division, had not been served, nor had the decree been actually amended so as to conform to the certificate. After a somewhat lengthy correspondence, in which the plaintiff's solicitor demanded the removal of the defendant's walls in accordance with the decree as affirmed, the defendant declined to remove his walls, and the plaintiff moved to commit him.

The motion was argued on the 2nd day of September, 1884, before Boyd, C.

Geo. Bell, for the defendant, took the following objections :

1. That the suit was not properly revived, as the order to revive had been taken out in the Chancery Division of the High Court of Justice, while the cause was pending in the Court of Appeal.

2. That no certificate of the Supreme Court had been served, and that the party making this motion must prove its service.

3. That the notice of motion did not specify the acts of disobedience or breaches of the injunction.

MacLennan, Q. C., and *E. D. Armour*, for the plaintiff. The old rule as to service of injunctions is not the rule now, unless there are such laches as might induce the defendant to think the decree had been abandoned. If the defendant had knowledge of the injunction and its intended enforcement that is sufficient, and the defendant's letters show that he had an intimate knowledge of the whole case: *United Telephone Co. v. Dale*, 25 Ch. D. 778. The notice of motion is quite specific enough after all the correspondence, for the defendant was aware of the acts complained of. The appeal to the Court of Appeal is but a step in the cause, and the order of revivor was properly taken out in the Chancery Division; at any rate no machinery for reviving is provided by the practice of the Court of Appeal. The defendant should have moved against the order of revivor within fourteen days. He has allowed the case to be argued and disposed of in the Supreme Court without raising any objection to the revivor, and it is now too late to say that the suit was not properly revived.

Mr. Bell asked leave to examine the registrar to show that the minutes of the decree contained originally a mandatory injunction, which was altered to the form of injunction now in the decree on an application to the Judge who tried the case, which leave was refused.

An affidavit of the defendant was read, which set out (amongst other things) that the walls complained of were erected by the defendant upon the lands where they stand upon the faith of a survey made by a surveyor employed by him, and under a mistake of title.

Mr. Bell. Unless the continuance of these walls is a trespass, the defendant has not trespassed on the plaintiff's lands. The defendant in any event is entitled to retain the land whereon the walls have been erected, upon making com-

pensation therefor, which he has offered, and still offers to do: R. S. O. ch. 95, sec. 4. The defendant has not been guilty of any wilful breach of the injunction. If the land belongs to the plaintiff the defendant could not enter thereon for the purpose of removing the walls, without committing a trespass. If the Court had intended that the defendant should remove the walls, a mandatory injunction would have been granted, and without a mandatory injunction the defendant cannot be compelled to remove them. The decree has not been amended in accordance with the judgment of the Supreme Court. The pleadings and evidence read in connection with the decree show that the injunction referred to alleged trespasses other than the continuance of the wall.

September 2nd, 1884. BOYD, C.—I may as well dispose of the preliminary objections. It is immaterial when the order to revive was obtained, whether before or after the judgment in Appeal. The revivor should still be in the Court below, because the appeal is but a step in the cause, and there is no machinery in the Court of Appeal for reviving suits. See Rev. Stat. Ont., ch. 38, sec. 40.

Then as to the want of service of the Certificate of the Supreme Court. The disobedience complained of is disobedience of the decree. It is this which the defendant is required to obey. Therefore the service of the decree is sufficient. If there had been a material variation in the decree I would require that the certificate should be served. There is no material variation. The plaintiff is practically right, and the defendant is practically wrong. Besides, it is too late to object that an order should be taken out varying the decree after an enlargement and argument on other grounds.

It is also objected that there is no allegation of specific acts of disobedience in the notice of motion. The correspondence between the defendant and the plaintiff's solicitors is very ample and shows clearly that the defendant was well aware of what was complained of. I think the

correspondence sufficiently intimates to the defendant what the plaintiff desired, and it was unnecessary to re-iterate it in the notice of motion.

As to the form of the decree, I would have expected to find in it a mandatory order for the removal of the building. It is argued that it is sufficient as it is; probably so; I wish to look at it. If it were mandatory in form there is no doubt the plaintiff could have the relief asked. It is quite plain she is entitled to some relief. The plaintiff was entitled to the specific relief asked. This is not a case for compensation; and, besides, it is too late to ask for it now. The defendant does not claim it in his pleadings, nor did he present a case for it to the Judge who tried the case.

I reserve the point whether the decree is sufficient in form. If I come to the conclusion that it is not, I think the plaintiff may have an order for the specific relief asked, as it is plain she is entitled to it.

September 5, 1884. *BOYD, C.*—The pleadings and evidence leave no doubt that the plaintiff complained of the defendant building four inches on the land in dispute as an act of trespass. By the decree the defendant is ordered not to trespass, or rather an injunction is awarded restraining from trespassing on the plaintiff's lands. The continuance of the wall is a continuous trespass, which is in law a series of trespasses from time to time, and is thus a breach of the injunction: *Goodson v. Richardson*, L. R. 9 Ch. App. 224.

Upon the defendant removing from the plaintiff's land those parts of his building which are on the plaintiff's land within a month no order except that the defendant pay the plaintiff's costs of this application, otherwise the motion is granted, with costs.

G. A. B.

(a) The defendant appealed from this decision to the Court of Appeal. On the 21st October a motion was made to the Court of Appeal to quash the appeal on the ground that the order in question was not an appealable order, and the Court quashed the appeal. On the 22nd of October, the defendant asked leave of the Court of Appeal to appeal from the decision, but the Court declined to interfere.

[CHANCERY DIVISION.]

ROBINSON ET AL. V. COOK.

Mortgage of going concern—Mortgage of factory—Estoppel—Chattel mortgage not in esse—Necessity of registration—Rights of assignee for creditors.

H. H. S. gave a mortgage to R. to secure a past debt and future advances, in which it was recited that security was to be given "by the lands hereinafter mentioned, and also by the machinery hereinafter mentioned," and which proceeded to mortgage the said lands "together with the machinery and foundry apparatus now in use and that may in future be used in the brick and frame buildings situate on the said lots, used as a machine shop and a foundry downstairs, and as a printing office upstairs, the machinery being composed of one printing press, &c., (describing various articles of machinery), together with all the machinery now in or that may hereafter be put in the said premises." In the proviso in the mortgage the property was described as "lands and chattels." The mortgage was registered but was not filed as a chattel mortgage, nor was there change of possession.

Held, that the above was, in effect a mortgage of the machine shop and foundry, and of the printing office as going concerns, not of the land as such and chattels as such, and had the same force and effect as if these had been mortgaged, naming them.

Held, therefore, that certain articles in question in this action, which were at the time of the execution of the mortgage on the premises, and were essential parts of the going concerns, passed under the mortgage.

Held, also, following *Kitching v. Hicks*, 20 C. L. J. 112, that the mortgage was in any event good without registration as a chattel mortgage, so far as it was a mortgage upon property brought upon the premises after its date.

The mortgagee having commenced proceedings under the mortgage, one H. C. S. professed a claim to some of the property as an alleged partner of H. H. S., the mortgagor. It appeared, however, that he was present when the mortgage was given, and knew all about the transaction: that the money that had been advanced was partly for the purposes of the printing office, in which only he claimed to be interested as such partner, and the future advances were to be partly for the same purposes; and that he had then made no objection, and asserted no claim.

Held, that under these circumstances H. C. S. was estopped from setting up any right or title as against the mortgagees, whose title was the same as if he had joined in the mortgage.

The defendant, who was assignee for creditors of the mortgagor, was threatening to remove certain of the property comprised in the mortgage, acting, as he said, for the benefit of the creditors. The plaintiffs claimed an injunction to restrain him. In his defence he alleged that he was a creditor of the mortgagor at the time of the execution of the mortgage in question, and that after the commencement of this suit he recovered a judgment for the amount of his debt, and he claimed a right to the property taken by him as against the plaintiffs as such creditor.

Held, that he was entitled thus to avail himself of his position as a creditor at the date of the mortgage, notwithstanding the fact that in removing the goods he alleged that he had acted for the benefit of the creditors, and although he did not recover his judgment and execution before the commencement of the suit.

An assignee for the benefit of creditors takes only such title as his assignor had to the property.

THIS was an action brought by the mortgagees of certain property against an assignee for the benefit of the creditors of the mortgagor, claiming payment of their mortgage debt or in default foreclosure, and also claiming an injunction restraining the defendant from removing certain articles which they alleged were covered by their mortgage.

The circumstances of the case, and the arguments of counsel, are sufficiently stated in the judgment.

The action was tried at the sittings of this Court at Stratford, on October 22nd and 23rd, 1883, before Ferguson, J.

C. Moss, Q. C., for the plaintiff, referred to *Crawford v. Findlay*, 18 Gr. 51; *Strickland v. Parker*, 54 Me. 264; *Lumsden v. Scott*, 19 C. L. J. 78 (a); *Re Coleman*, 36 U. C. R. 559; *Johnston v. Hodgins*, 5 A. R. 449.

S. H. Blake, Q. C., and *Stone*, for the defendant referred to *Dewar v. Mallory*, 26 Gr. 618; *Keefer v. Merrill*, 6 A. R. 121; *Crawford v. Findlay*, supra.; *Re Harrett*, 5 A. R. 206; *Re Andrews*, 2 A. R. 24; *Barker v. Leeson*, 1 O. R. 114; *Parkes v. St. George*, 2 O. R. 342; *Kitching v. Hicks*, 19 C. L. J. 277; *Nelles v. White*, 29 Gr. 338.

C. Moss, Q. C., in reply, referred to *Dickson v. Hunter*, 29 Gr. 73; *Ferrar v. Stackpole*, 6 Me. 130; *Davis v. Wickson*, 1 O. R. 369.

March 17th, 1884. FERGUSON, J.—The plaintiffs claim under a mortgage from Henry H. Stovel and wife to them, dated the 27th day of December, 1882, whereby,—after reciting that the plaintiffs had advanced to the mortgagor cash to the amount of seven thousand dollars, which had been otherwise secured by notes and endorsements, and that it had been agreed that further advances might be made, and that the mortgagor had agreed to give the mortgage to secure the plaintiffs for the then present debt of \$7,000, and for further debts to them by note or otherwise,—the mortgagor, in consideration of the then debt and

(a) Since reported, 4 O. R. 323.

further advances, did grant and mortgage the property embraced in the mortgage to the plaintiffs, their heirs and assigns forever.

The plaintiffs are bankers, carrying on business in the town of Hamilton.

The description of the property is as follows:—

“All and singular those certain parcels or tracts of land and premises lying and being in the Town of Mount Forest, * * being composed of Lot number Two, Main street west, one-half an acre; Lot Two, Elgin street east, one-half an acre; south half of Lot Ten, Elgin street east, one-quarter of an acre; Lot Eleven, Elgin street east, one-half an acre; Lot Twelve, Elgin street east; also part of Lot number Thirty-three, in the first concession of the Township of ———, known as the Bentley property, two acres, together with the machinery and foundry apparatus now in use and that may in future be used in the brick and frame buildings situate on the said Lots Eleven and Twelve, Elgin street east, used as a machine shop and foundry downstairs and as a printing office upstairs, the machinery being composed of one power printing press, known as a Wharfedale, one printing press made by Gordon & Co., one iron turning lathe, made in Leeds, England; one iron planer, made by G. M. Gibson; one engine made by Stovel & Son; one large vertical drill made by Morrison Bros., Toronto; one wood-bed lathe bought of G. M. Gibson; one boiler made by Goldie & McCullough; one thirty horse-power engine, made by Stovel & Son; together with all the machinery now in or that may hereafter be put in the said premises.”

In the proviso in the mortgage the property is mentioned as “lands and chattels.” The action is brought for an injunction restraining the defendant from removing, carrying away, or otherwise dealing or interfering with the articles, machinery, apparatus and plant described and comprised in the mortgage, and for an order compelling the defendant to restore to the premises certain articles removed or carried away therefrom by him, and restraining the defendant from selling or parting with any such articles. The

plaintiffs also claim possession of the premises and damages, as well as payment of the amount due on the mortgage, or in default foreclosure. The defendant, who is a son-in-law of the mortgagor, Henry H. Stovel, claims under a deed of assignment for the benefit of creditors bearing date the 7th day of June, 1883, made by the said Henry H. Stovel to him in trust for the creditors of Stovel, another deed of the same date also for the benefit of creditors, and a deed of confirmation bearing date the 14th day of June, 1883, executed by Henry H. Stovel and his son Henry Carr Stovel to the defendant, which is also in trust for the benefit of the creditors, in this deed said to be the creditors of the grantors, Henry H. Stovel and his son. These deeds are drawn "subject to the charges or incumbrances, if any," then existing on the property.

The defendant also says that at the time of the execution of the plaintiffs' mortgage he was a creditor for a large sum of his father-in-law, Henry H. Stovel, and that after the commencement of this suit he recovered a judgment for the amount of the debt; and he claims as against the plaintiffs a right to the property as such creditor. An exemplification of this judgment was put in at the trial.

Before this suit was commenced many articles of this property had been removed from the premises by the defendant; this was not denied, nor was it denied that the defendant was in possession of the factories and had excluded the plaintiffs therefrom.

The defendant admitted that he did remove off the property claimed by the plaintiffs two vertical drills, the planer, the grindstone, three iron lathes, one wood lathe, an engine that was said to be for sale, and some belting. The other property claimed by the plaintiffs was admitted to be attached to the freehold and to have passed to the plaintiffs by their mortgage. The contention of the defendant was, that the property taken by him was chattel property simply, and that it did not pass to the plaintiffs by their mortgage. The plaintiffs' contention was two-fold: first, that all the property was attached or affixed to

the freehold and was in law part of the freehold and did pass to them ; and secondly, that the mortgage to them was a mortgage upon the foundry and printing office, and that whether or not all the items of property and plant were affixed to the freehold they passed to them by the mortgage. This mortgage, though duly registered in the registry office, was not filed as chattel mortgages are required to be by the Statute, and there was not the change of possession mentioned in the Statute.

As to the title of the defendant as assignee for the benefit of creditors, it has, I think, been more than once decided that such an assignee takes only the title that the assignor had to the property, and it was not contended that the plaintiffs' mortgage was not good as between them and Stovel, and besides the assignment to the defendant was subject to all charges and incumbrances, if any, on the property ; and I think it beyond doubt that the plaintiffs' mortgage was a charge and incumbrance on the property within the meaning of these words, and I think the plaintiffs' title clearly good as against the title of the defendant as assignee for the benefit of creditors.

Henry Carr Stovel professed to have had a claim or title to some of the property as an alleged partner of his father, Henry H. Stovel. The evidence, however, shows that he was present when the mortgage was given to the plaintiffs and knew all about the transaction ; the money that had been advanced by the plaintiffs was partly for the purposes of the printing office, in which only he claimed to be interested as such alleged partner, and the money then to be advanced was to be partly for the same purposes. He stood quietly by when the transaction was made with the plaintiffs without asserting any claim to ownership or part ownership of the property, or giving the plaintiffs any information whatever as to the claim now sought to be made out in his favour for the purpose of diminishing or subtracting from the rights claimed by the plaintiffs. I think it plain that he is estopped and debarred from setting up any right or title as against the plaintiffs to the property

including the press that had been purchased but had not then been delivered at the place ; and I think the plaintiffs' title just the same as it would have been if this Henry Carr Stovel had joined in the mortgage to them. Although the defendant says that he did what he did acting as assignee for the benefit of the creditors, yet his right as a creditor must be considered, because this is set up for the purpose of affecting the alleged title of the plaintiffs, and if they had not a good title they cannot (not having been in possession) maintain the action.

In *Kitching v. Hicks*, 3 C. L. T. 500, the plaintiff claimed under an unregistered agreement, and it was held that the agreement could not be successfully attacked by an assignee in trust for creditors, but that creditors who were defendants might ask to have it declared void, so that the goods might fall into the assignment. This was following the principle acted upon in *Parke v. St. George*, 20 C. L. T. 353 (b). *Kitching v. Hicks* was re-heard, and the judgment on one point varied, but this branch of it was not disturbed. Now, according to this authority, I do not see why this defendant cannot avail himself here of his position as a creditor at the date of the plaintiffs' mortgage by saying that the mortgage is not good. This defence to the plaintiffs' case he fully sets forth and relies upon in his statement of defence, and I am of the opinion that notwithstanding the argument of counsel to the contrary the defendant may avail himself of his position as a creditor, and this although he did not recover his judgment and execution before the commencement of this suit. This seems to have been decided in *Parke v. St. George*. On this last subject the case *Barker v. Leeson*, 1 O., R. 114, though a decision under another part of the Act commonly known as "The Chattel Mortgage Act," may be looked at. See the remarks of the learned Judge at page 117.

This brings me to the consideration of the question whether or not the property that was taken and removed by the defendant is comprehended as part of the freehold in the plaintiffs' mortgage, for it was not contended

that the plaintiffs' mortgage was not good as a mortgage of lands; and also the consideration of the rights in respect of that portion of the property that was brought upon the premises after the execution of the plaintiffs' mortgage, for the branch of the case *Kitching v. Hicks* which decided that where such an agreement (or mortgage) affects goods to be acquired *in futuro* only it does not require registration, yet when it covers present as well as future acquired goods it must be registered, otherwise it is void altogether for want of registration, was, according to my recollection (the judgment is not yet reported, I think) (c), reversed on the re-hearing of the case, so that the plaintiffs' mortgage would appear to be good without registration, so far as it was a mortgage upon the property brought upon the premises after its date.

It was conceded at the trial that the engine and boilers that ran the machinery were fixtures and part of the freehold.

In the case of *Crawford v. Findlay*, 18 Gr. 51, much relied on by the plaintiffs' counsel, the contract of sale was stated to be one by which the vendors agreed to sell not merely the land and buildings but the factory complete, with all its machinery, for a given sum and a mortgage was to be given to the vendors for the unpaid purchase money. In this mortgage the property was described as "All and singular that certain parcel or tract of land and premises known as Branchton Woollen Factory." Some of the machinery was fastened to the building by screws, some by nails, and some was not fastened or affixed but rested by its own weight and was kept in its own place by *cleats*, and all this machinery was held to be fixtures and part of the realty, the learned Judge expressing some doubts as to the parts of the machinery that had no fastening but was only kept in place by cleats. This was only one of the two branches of the plaintiffs' case in the suit, but the holding was distinct and clear.

In *Keefer v. Merrill*, 6 A. R. at p. 131, Mr. Justice

(c) It is noted 20 C. L. J. N. S. 114; and a full report will shortly appear in 6 O. R.

Burton in referring to *Crawford v. Findlay*, says : " Upon this branch of the case I must confess I do not share the doubts of the learned Judge, but consider it plain upon the authorities, that the factory having been conveyed *eo nomine*, and the articles in question being essential parts of it necessary for the operation of the other fixed machinery and without which it would be useless, and all treated by the grantors (who had a right to deal with it either as realty or personalty) as realty, would have passed without the aid of the artificial fastenings, which were there used to steady them in working."

The frame of the mortgage in the present case has given me much anxiety. In the recital referring to security to be given it says, " by the lands hereinafter mentioned, and also by the machinery hereinafter mentioned." In the description the lands are first described, and then the document says, "together with the machinery and foundry apparatus now in use and that may in future be used in the brick and frame buildings situate on the within named Lots 11 and 12, Elgin street east, used as a machine shop and foundry down-stairs and and a printing office up-stairs." The description then goes on to state what the machinery is and in so doing mentions the engine and boiler, which are undeniably and admittedly parts of the realty, and in the proviso the property is referred to as "lands and chattels." To create the intended charge there is only one document, and there is no division of the money into the respective sums that were to be secured by respective kinds of property as there was in *Dewar v. Mullory*, 26 Gr. 618. Nor is the document in this respect like (so far as I am able to see) the one in *Carscallen v. Moodie*, 15 U. C. R. 304, for there the grantor, after conveying certain land and other real estate particularly described with their appurtenances, conveyed and assigned also : "All the goods and chattels, stock in trade, plank-road stock, and steamboat stock set forth in a schedule attached to the deed," and in this schedule the several machines in question in that suit were set down as goods and chattels.

I have examined a very considerable number of cases

without gaining from them much information to aid me in arriving at a conclusion as to the meaning of this document. The conclusion that I have, however, arrived at is, that it is in effect a mortgage of the machine shop and foundry, and of the printing office, and has the same force and effect as if these had been mortgaged, naming them, if they had any names. I think this sufficiently appears on the face of the document to have been the intention of the parties, and that the mortgage transaction was in respect of going concerns, and not in respect of land as such and chattels as such. I think if a man says, "I convey my lands, my building thereon and my machinery in the said building, all being used as a factory," this is the equivalent of the same man saying, "I convey my factory," and the use of the word chattels appears to me to have been for greater caution lest any of the property might possibly be considered chattels, and I think it plain from the evidence that the articles in question now that were at the time of the execution of the mortgage on the premises were essential parts of these going concerns, and passed, I think, by the mortgage to the plaintiffs (excepting the engine that was in the premises and for sale.) For reasons that I have before given I think the mortgage was without being filed good to pass the after-acquired property.

If I had been of a different opinion as to the meaning of the mortgage, I think it could nevertheless be shown that most of the property in question were fixtures and part of the realty.

I think the plaintiffs are entitled to the injunction they ask, and to the order for the restoration of the property removed by the defendant. I also think they are entitled to the foreclosure judgment asked and to immediate possession of the premises, and to a reference as to damages, which will be at their own risk as to costs, and I think the defendant should pay the plaintiffs their costs of suit down to and inclusive of judgment.

Further directions, if necessary, and subsequent costs are reserved.

A. H. F. L.

[CHANCERY DIVISION.]

VAN EGMOND V. THE CORPORATION OF THE TOWN OF SEAFORTH.

Municipal law—Drainage—Nuisance—Action for damages—Arbitration—
R. S. O. ch. 174, secs. 369, 373, 466, sub-sec. 51, 529, seq.

The defendants constructed a number of drains in their town, discharging into a creek running through the lands of the plaintiff, which drains conducted a quantity of brine or salt and refuse from salt manufactories in the neighbourhood into the creek, and rendered the water filthy and unfit for drinking, and also corroded the machinery in the plaintiff's woollen factory. And the defendants, having passed a by-law to deepen the said creek, threw down the plaintiff's fences, entered upon his land, and threw up earth from the bed of the creek and left it there.

Held, (affirming the decision of PROUDFOOT, J.,) that the drains not being constructed under a by-law, the plaintiff was entitled to maintain an action for his injury sustained, and for an injunction, and was not compelled to sue those who had discharged the offensive matter into the drains, nor to seek his remedy under the arbitration clauses of the Municipal Act, nor to resort to mandamus to compel better drainage.

Held, also, that damages for the trespass on the plaintiff's land could be recovered by action, as the corporate powers under the by-law for deepening the creek might have been exercised without the commission of the trespass; and this, too, notwithstanding that the work was done under and by means of a contractor, who, however, was not an independent contractor, but worked under the superintendence of the council.

Seemle, per PROUDFOOT, J., that the right to foul the stream could not be acquired by the defendants by a user of twenty years.

THIS was an action brought by August G. Van Egmond against the corporation of the Town of Seaforth, setting out certain alleged wrongful acts of the defendants in connection with the drainage of the said town, and claiming damages, an injunction restraining any repetition of such acts, general relief, and costs of suit.

The statement of claim set forth a number of causes of action, only two of which need be adverted to, namely those which related to the pollution of a certain stream called Silver Creek, and certain trespasses alleged to have been committed on the plaintiff's land in the course of deepening the said stream.

The action was tried at Goderich on March 20th and 21st, 1883, before Proudfoot, J.

The evidence established the following facts:

The defendants were incorporated as a village in the year 1867, and subsequently as a town. A natural stream or water course, called Silver Creek, flowed through the town and thence through the land of the plaintiff, which adjoins the town limits.

In 1869, and the two or three following years, salt works were erected in different parts of the town for the manufacture of salt by means of the evaporation of brine pumped from wells sunk to a great depth in the earth.

A certain quantity of the brine and salt found its way from soakage, leakage, and other causes into the creek by means of percolation through the soil, but this quantity was not sufficient to injure the quality of the water for any purpose.

In and after the year 1876, the defendants, without passing any by-law respecting the same, constructed a number of surface drains for the purpose of more thoroughly and effectually draining, cleaning, and purifying the town, which drains they discharge into the stream at a point within the limits of the town, and of course above the plaintiff's land. The result of their doing so had been by concentrating the surface water, and possibly to some extent also by the direct user by the manufacturers of the drains in question, to thoroughly impregnate and pollute the stream with salt or salty matter and refuse from the manufactories—to render the water filthy and unfit for drink; and, as the plaintiff more especially complains, to make it unfit for use in his woollen manufactory, as it destroyed the engine, and boiler, and pipes, and is useless for the purpose of washing and cleaning the wool.

In connection with, and for more effectually carrying out their system of drainage, the defendants, in 1876, passed a by-law in pursuance of section 529 and following sections of the Municipal Act, for deepening Silver Creek through the town and through the plaintiff's land in the adjoining township. In executing this work the plaintiff's fences were thrown down, and a quantity of earth and soil thrown up from the bed of the stream on the plaintiff's

land and left there, injuring the land and making access to the stream less convenient.

The natural flow of the surface water from the area of the town is towards Silver Creek, and it would be more expensive to carry it elsewhere, or to discharge it at a point where it would not affect the plaintiff (a).

Garrow, for the plaintiff.

Holmsted, for the defendants.

March 21st, 1883—PROUDFOOT, J.—I suppose I may as well declare the conclusion I have come to upon the case now, and stay the issue of a decree or an injunction for some time to enable the parties to come to a settlement about it.

I think there is no doubt that the plaintiff, Mr. Van Egmond, has the right to have this stream flow with its natural quantity and purity of water through his land; that that is a right no one can interfere with without subjecting himself to an action; that in this case there is no doubt that the water of the stream has been rendered foul and impure, and unfit for the purpose of the manufactory that he was carrying on upon its banks.

There is no doubt also that this impurity came from the town of Seaforth, that it came from this drain that was emptied into the river a short distance above Mr. Van Egmond's property. Previously to the making of that drain the water had been pure. In 1866 and for some time, some years, afterwards it had been used for household purposes, was used for drinking, the cattle used it, and it was used for washing, and I think for all the other household purposes that it was necessary to use it for, but after the drain was made, after these salt works were in operation, and foul matter was sent through the drain into the stream it became unfit for these purposes, the cattle would not drink it, and it could not be used for the purpose of fulling cloth, and for the other purposes connected with the manufactory of the plaintiff, and I think that the evidence also establishes very clearly that this salt was so extensively sent into the stream that even at a considerable distance below Mr. Van Egmond's property it destroyed the boilers in

(a) The above statement of the facts in this case is from the judgment of Osler, J. A.

which it was used. Then that there was some salt in the stream prior to the drain there seems to be no doubt, and that the percolation of the salt through the soil to some extent affected the water. Mr. Brett (b) says to the extent of 12 per cent. at his tannery, but not to so great an extent as to be injurious to his boiler, but that is altogether altered now, and it has become not only slightly tainted, but thoroughly impregnated with the salt and other foul matter.

Then the plaintiff having found where this foulness comes from, that it comes into the river by a drain which has been constructed by the defendants, I do not think that he is bound to go any further and to search out which of the inhabitants of the town have emptied the foulness into the drains. All he need do is to find there is a drain made by the town pouring forth the nuisances and filthiness into the water, rendering it valueless for his purposes, and he may hold the town responsible. If the town has not chosen to exercise its powers in preventing the drainage of foul matters into their drains, or if it has not chosen to exercise its powers to prevent drainage at all, then I think it is equally responsible to the plaintiff; and here it does not seem to have done so. It would be impossible, it would be a mere delusion to say to the plaintiff you have a right to restrain persons who have thrown this nuisance into the drain, you have no right to restrain the persons who have made the drains. Why, it might put him to a hundred and fifty different actions to find out the various people who have contributed, however minutely, to the foulness that was carried off by this drain. I think reason and common sense, to which Mr. Holmsted appealed, ought to guide us in this case, and that reason and common sense only require that he should go to the nearest place where the foulness is discharged, and when he finds that that belongs to the town, that he can make the town responsible for it.

It is true that this is a very valuable industry that seems to have sprung up at Seaforth, and a large amount of capital is invested in it, but I do not know that the largeness of the capital, or the valuable nature of the interest is of any importance in determining the

(b) Mr. Brett was one of the witnesses for the defendants, and the owner of a tannery situated below a certain dam at Egmondville. He testified that he got the water for the purposes of the tannery from the race coming from this dam, into which dam Silver Creek and another stream ran.

right of Seaforth, or of the manufactories, to pollute this stream. The plaintiff's right is equally good with theirs, the fact that it is of smaller importance is of no importance in a legal point of view. The one right is equally entitled to protection with the other. If it were otherwise, it would put the rights of the smaller members of the community entirely within the control of those who are more wealthy and able to invest larger sums of money, and obtain thus the control of the law. I think it would be a very sad time indeed if we should ever reach that point when the investment of capital was to determine our rights.

I think that is the only point, or the principal point, that Mr. Holmested argued: that here the town was not the owner of the salt wells, and did not create this foul matter that was thrown through its drain into the stream. I do not think that that is a defence.

As to the other matter that was spoken to, of the deepening of the stream, I suppose the town had the right to deepen it under the law, but I think it was also a duty on them so to deepen it as not to interfere with the rights of the plaintiff, to restore his land to its original state, or at all events to a condition that was not injurious to him. The only evidence we have about the position of this soil is, that it is thrown up in banks along the bank of the stream, thrown up in hills, and otherwise placed in such a way that he cannot get a drain, that the water from his land does not drain into the stream as it ought to do. That is a nuisance, and the defendants have not taken care to provide against it.

I think that the defendants are liable for that, notwithstanding that the work was done under and by means of a contractor. The defendants were superintending the contractor, they knew what he was doing, and individual members of the corporation assured the plaintiff that the land would be properly levelled.

Then as to the other point about the fences, it seems clear that has not been done. Mr. Wilson (c) tells us that the plaintiff made a complaint on the subject; and that the complaint was considered by the council and the committee of streets was ordered to repair it, and this has never been done. It is quite clear in that case, at all events, that the

(c) Wilson was a member of the municipal council of the town of Seaforth, and was a witness for the defendants.

council has been applied to, and it has not done what it ought to have done.

I do not think there has been any acquiescence of the plaintiff in this fouling of the stream, supposing that a right might be acquired by a 20 years user to foul the stream, which at present I do not think it could be. It is true that the drainage of the town has been perhaps in use for more than 20 years, but it was draining merely surface water, and such as the plaintiff would have no reason to complain of, into the stream; but the time when the foul water began to be drained into the stream is not 20 years back, and there has been no such laches as prevents the plaintiff from seeking to have his rights respected, and no acquiescence in the conduct pursued by the plaintiff.

I think that on all grounds the plaintiff is entitled to an injunction, or rather to an order directing the levelling of this land, or the removal of the soil that has been taken out of the channel of the stream, and to replace the fences and to prevent the town from throwing any foul water or to prevent any foul water going through its drains into the streams.

There will be a reference as to damages to the plaintiff in the past.

I do not think the defendant has interfered with the plaintiff's rights to any appreciable extent with regard to the waterworks. I do not limit the order to merely restraining the pouring of salt in the stream; at present I do not think there has been anything else made out than the polluting of the water with salt: the stuff taken out of the stream to be levelled; and the decree not to issue for a month, to see if the parties can come to settlement.

Afterwards the defendants moved by way of appeal to the Divisional Court.

The motion was heard on December 6th, 1883, before Osler, J. A., and Ferguson, J.

S. H. Blake, Q.C., and Holmested, for the appellants. The proper remedy for the plaintiff is in damages: *Harr. Mun. Man.*, 4th Ed. secs. 529, 545; *R. S. O.*, c. 199, sec. 3; *In re Yeomans and The Corporation of the County of Wellington*, 43 U. C. R. 522; *Darby v. Crowland*, 38 U. C. R.

338; *St. Pancras v. Batterbury*, 2 C. B. N. S. 477; *Regina v. The Municipal Council of Perth*, 14 U. C. R. 156; *Stonehouse v. The Corporation of the Township of Enniskillen*, 32 U. C. R. 562. At all events the proceedings should have been by way of *mandamus*, not of injunction: *Glossop v. Heston and Isleworth Local Board*, L. R. 12 Ch. D. 102; *Brown v. Russell*, L. R. 3 Q. B. 251; *Attorney-General v. Guardian of Poor of Union of Dorking*, L. R. 20 Ch. D. 595; *Attorney-General v. Acton Local Board*, L. R. 22 Ch. D. 221; *Charles v. Finchley Local Board*, L. R. 23 Ch. D. 766. We also refer to *Gillson v. North Grey R. W. Co.*, 33 U. C. 128; *Juson v. Reynolds*, 34 U. C. R. 175; *Angell on Watercourses*, 7th ed., secs. 108 (l) 114, 114 (c) 114 (d).

Garrow, for the respondents. Seaforth is a town of very modern foundation, the result of the railway built there twenty-nine years ago. Here is an individual up-stream polluting the running stream of this riparian proprietor. If the defendants, because they are a municipal corporation, set up a right to pollute the stream, they must give us some authority to support this. The evidence shews clearly this stream is made impure by something which enters it in the town of Seaforth. As to the argument of utility, the Court does not stop to consider this: it simply considers whether a wrong has been done, and can be remedied. The simple question is, whether the corporation is liable or not. It is only within some few years that the salt has become a nuisance, but it is getting worse every year.

[OSLER, J.—I suppose the town had the right to make these surface drains.]

These are not in all places surface drains, some are covered drains.

[OSLER, J.—Is there any evidence that the salt comes from any other quarter than from these works?]

[Blake, Q. C.—No, none whatever.]

Have we not a right to say to the corporation, you have power to prevent this, therefore you must prevent it.

That is the distinction between this and the English cases cited by Mr. Blake. But in *Charles v. Friendly Board*, *supra*, the Court held the plaintiff could proceed against the local board, because the latter had the power to prevent the wrong. This is the strongest case in favour of the plaintiff. R. S. O. ch. 174, sec. 410, sub-sec. 4, gives the municipality power over their own drainage. The corporation can pass a by-law compelling these persons to stop sending their salt into the drains. The corporation have taken this active part; they have put in the drains which enables this wrong to be done.

[FERGUSON, J.—Can you point out wherein the local boards are more limited in their powers in England than the municipalities here?]

I gather from the cases themselves, the local boards in England must be more limited in power.

Is not our cause of action complete when we find the corporations have constructed the drains through which the pollutions proceed? The corporation are responsible for the ditch and therefore for the pollution. Suppose the pollution amounted to poisoning from arsenic or other poisonous materials used in manufactures, would the fact that the corporation had a right to construct drains excuse them letting the poison pass over the drains? That arguments of utility cannot be used against the plaintiff's right is clear: *Goddard on Easements*, 2nd ed., p. 346; *Lillywhite v. Trimmer*, 36 L. J. N. S. Ch. 525. *Hiscox v. Lander*, 24 Gr. 250, I may refer to, and also to *Attorney General v. Leeds Corporation*, L. R. 5 Ch. 583; *Colney Hatch Lunatic Asylum*, L. R. 4 Ch. 146; *Spoker v. Banbury Board of Health*, L. R. 1 Eq. 42. As to saying we might have a remedy by *mandamus*, the facts here are not such that we could get a *mandamus*: *Brooks v. The Corporation of Haldimand*, 3 A. R. 73. The corporation may or may not regulate and divert, &c., drains. The corporation has discretionary powers. What could we compel them to do? Then the power to receive compensation under the statute would not apply here. We live beyond the territorial

jurisdiction of the corporation, and they have no power to acquire such rights over lots beyond their jurisdiction.

I refer also to *Hughes v. Percival*, 9 Q. B. D. 441, and also to *Farrell v. The Mayor and Town Council of London*, 3 U. C. R. 343. *St. George's Church v. Corporation of Grey*, 21 U. C. R. 265, shews at all events the necessity of a by-law. The case is simply this: the corporation by its own acts pollutes the stream; they have the power to stop the pollution, but they do not choose to do it. It is sufficient for us to find this drain discharging this pollution into our stream, to come upon the author of the drain. See R. S. O. c. 174, s. 454, sub-s. 10; sec. 466, sub-ss. 49-52.

Blake, Q. C., in reply. It is admitted that all that was done by defendant was, to make the drain for the surface water; the salt makers choose to make use of these by putting drains into it. Were it not for the decree made I would have thought it clear the corporation was not to be responsible for an unlawful use by another of a lawful drain. The only case in which they would be, would be if they had given permission to the person who polluted the stream. Here the corporation would have to stop the drain, and cast the water back on all the parties who have been assessed to make the drain. The whole town of Seaforth is injured, because certain persons engaged in the salt works misuse the drain. The corporation would be driven to seek an injunction, and is it right that they should be left to bring a doubtful action and be met with the question: What injury have you suffered? I refer to *Patterson v. Corporation of Peterborough*, 28 U. C. R. 505. Then the power of the corporation is not such as represented. The by-law stands and has not been moved against: *Vandecar v. Corporation of East Oxford*, 3 A. R. 131. For six years the by-law has stood, and the plaintiff has done nothing. It is not correct to say the system of drainage was new, it was the old one, the old drains being deepened.

February 21st, 1884. OSLER, J. A.—This is a re-hearing at the instance of the defendant of a decree pronounced by my brother Proudfoot in favour of the plaintiff at the trial of the action at Goderich in March, 1883. [The learned Judge then set out the effect of the statement of claim and of the evidence as above, and continued :]

In the *Attorney-General v. Colney-Hatch Lunatic Asylum Case*, L. R. 4 Ch. 146, Lord Hatherley said: "The Court will always find its simplest course, as far as regards the administration of justice, is to ascertain the exact state of the law which regulates the relations of the parties; and having done so to proceed to act upon it without any reference to the difficulties of the case on the part of those against whom it is obliged to decide, leaving those parties to relieve themselves as best they can from the position in which they have placed themselves, and, if there be no other mode of escape, to cease to do the acts which occasion the wrong."

I do not suppose this principle is to be rigorously carried out to its full extent in every instance where the aid of the Court is invoked to restrain the continuance of a nuisance. It is not in every case of nuisance that this court should interfere, and it ought not to do so in cases in which the injury is merely temporary and trifling; but I think it ought to do so in cases in which the injury is permanent and serious, and in determining whether the injury is serious or not regard must be had to the consequences which may flow from it: *Attorney-General v. The Sheffield Gas Consumers Co.*, 3 DeG. M. & G. 304; *Goldsmid v. Tunbridge Wells Improvement Commissioners*, L. R. 1 Eq. 161, 1 Ch. 349. The plaintiff in the case before us is a riparian owner, and his right as such, unless there is something in the Municipal Act which says that he is not to enjoy it any longer, is to have this stream flow through his land undiminished in quantity and undeteriorated in quality. In the *Colney-Hatch Case*, *supra*, a public body in the exercise of powers conferred upon it by statute, created a nuisance by allowing their sewage to

drain into and pollute a stream. It was held that unless this was absolutely necessary for the performance of the object of the statute the defendants were responsible for any injury thereby caused to the property of others, and they were restrained by injunction from allowing the nuisance to continue.

So in the *Attorney-General v. Leeds Corporation*, L. R. 5 Ch. 583, the defendants were restrained at the instance of land-holders on the river Aire from allowing their sewage to drain into the river and thereby create a nuisance.

In *Goldsmid v. Tunbridge Wells Commissioners, supra*, the defendants drained the sewage of a town into a stream. They were restrained by injunction from permitting it to continue to do so, and pollute it to the plaintiff's injury. This was a case in which the sewage had for many years been drained into the stream without perceptibly polluting it, but with the increase of the population the impurity increased so as to become perceptible and injurious.

The case of the *Attorney-General v. Birmingham*, 4 K. & J. 528, and many others are of the same class—cases in which municipal corporations and other public bodies have been restrained from permitting noxious matters to pass through their drains and pollute streams and rivers.

That in this case the great weight of the evidence establishes that noxious matter does find its way into Silver Creek through drains constructed by and under the control of the defendants admits, I think, of no doubt.

It is equally clear that the stream is thereby polluted to a much greater extent than it formerly was, or that it would be in the absence of such drains, and to an extent that renders it unfit either for drinking or manufacturing purposes, and that the plaintiff sustains serious injury and one that is likely to be permanent.

On such a state of facts I should have thought it plain, that an action would well lie against the defendants, at the suit of the land owner, to recover damages for a legal

wrong—a nuisance committed by them—unless they could shew that it was in some way justified or excused by the Municipal Act.

Now, the powers conferred upon municipal corporations with respect to drainage are discretionary. The Act is permissive not imperative, R. S. O. ch. 174, sec. 466, sub-sec. 51, sec. 529 and seq. But to whatever extent they may think proper to exercise them in doing any act which may take away or injuriously affect private rights they must do so by by-law.

In that case when the private right or property affected by the works authorized by the by-law is one which the corporation have power to acquire or affect, the owner's right is converted into a claim for compensation, which must be worked out by arbitration under the statute, and not by action: *Ib.*, secs. 369, 373, 345; *Vestry of St. Pancras v. Batterbury*, 2 C. B. N. S. 477.

But if such powers are not exercised by by-law, and the corporation choose to make drains or open sewers in exercise of their ownership of and general jurisdiction over the roads and streets in the municipality, they do so at their peril, and are responsible for any injury they may cause to private rights, or nuisance which may arise from the execution of the works: *Reeves v. City of Toronto*, 21 U. C. R. 157; *Nevill v. The Corporation of the Township of Ross*, 22 C. P. 487; *Metropolitan District Asylum v. Hill*, 5 App. Cas. 582; *Metropolitan Board of Works v. London and North-Western R. W. Co.*, 14 Ch. D. 246, 521. In which predicament these defendants, in my opinion, stand as regards the principal subject matter of complaint.

The compensation or arbitration clauses of the Act cannot apply, as the works were not done in pursuance of any by-law.

The case was opened to us as if the defendants or some of the inhabitants of the town had acquired a prescriptive right to send polluted matter through these drains, and it was argued on the authority of some cases I shall mention that the plaintiff's only remedy was against the

individuals who sent the noxious and polluting substance into them.

It was contended that the defendants could not themselves stop up these drains; but could only bring an action against the salt-well owners to restrain them from using them, or allowing salt drainage to flow into them; and passages of some length were read to us, to show that you could not get an injunction against a man for not bringing an action against his neighbour.

It was also urged that these cases shew that the plaintiff's proper remedy was by *mandamus* to compel the defendants to take proper means to prevent the pollution of the stream by an improved or different system of drainage.

On examining these cases it will be seen that they deal with an entirely different state of things from that in question here. The first case is *Glossop v. The Heston and Isleworth Local Board*, 12 Ch. D. 102. There the defendants were a newly constituted local sanitary authority under the public Health Act, 1875, whose duty was to provide a satisfactory and healthy system of drainage. The action was not based upon any act whatever done by the defendants, but entirely upon their alleged neglect to execute the sanitary authority conferred upon them for their district. They had themselves done no act to create or increase the nuisance, and it was held that if they neglected to perform the duty cast upon them by law an action would not lie for damages at the suit of individual; but that the remedy was by prerogative writ of *mandamus*. It is clearly pointed out in the judgment of James, L. J., at p. 116, that the Court were not dealing with a case of a legal wrong done: "If this board were to create a nuisance which they were not excused from, if they were in the apparent exercise of their duties *using* or *making* a sewer which would convey sewage or filthy water into any natural stream or water course * * that would not prevent the jurisdiction attaching which existed before, or prevent it being exercised to remedy the wrong being

done." See also the observations of Cotton, L. J., on p. 122, to the same effect.

Then there is the case of the *Attorney-General v. Dorking Union*, L. R. 20 Ch. D. 595, which was very much relied on, and is the case in which the observations of the Master of Rolls occur about bringing an action against a man because he does not bring one against some one else. Lord Justice Cotton said that this decision was not contrary to any of the decided cases, mentioning some of those I have referred to. "There," he said, "the defendants who were restrained had done something actively to turn the sewage into the stream or on the lands of the parties complaining. In those cases the Act of Parliament had given them power to get rid of their sewage provided they could do so without committing a nuisance. And if they could not do it without committing a nuisance, the Act of Parliament did not authorize them to do it, and they were in the same position as individuals who were doing a wrong to their neighbour without any parliamentary authority." Jessel, M. R., pointed out, that in that case and in *Glossop's Case* the sewers which had become vested in the defendants were very old ones, in *Glossop's Case* having been used at least as far back as the time of Oliver Cromwell, and therefore that many persons had acquired prescriptive rights, which could not be interfered with, to send sewage through them. He thought that, looking at the way in which these sewers had been vested in the local authority, they had a very limited right of ownership, which probably would not authorize them to stop them up; but, assuming that they had the absolute ownership, could they, he asks, bring an action at law. "I think they could not. It is the case of a land owner with a sewer and drain through his land, through which persons above have a prescriptive right of drainage, and of sending sewage down. He cannot stop up the sewer as against them. But other persons, also above, who have no such prescriptive right, also send sewage down the sewer. As he cannot stop up the sewer, how is he to prevent it? I know

of no means except by bringing an action, not that he could in such case stop the sewer, but that he could bring an action to prevent them from throwing sewage in." He then says that he thinks that such an action might be maintained to prevent these other persons from acquiring new prescriptive rights, but points out that the land owner may be indifferent whether such new rights are acquired or not, and asks if he is to be, or can be, compelled to bring it by the person complaining of the injury. "It is impossible to suppose that any such action can be maintained. No such action has ever been heard of at Common Law, and I am sure no such action has ever been heard of in Equity, where a person cannot physically put an end to the nuisance, where he can only put an end to it, if at all, by bringing an action for an injunction, and I am satisfied no action at common law lies. Then, where do you get the right under the statute? The only rights under the statute are to prevent the local authority from committing a nuisance. They say, 'we have done nothing at all. We found the sewers in this state, and we left them there.'"

The difference between this case and ours is obvious. Here, nobody has acquired or could as yet have acquired prescriptive rights in these drains. They were made by the defendants, in whom they are absolutely vested as owners of the streets, and by whom they may be stopped up or diverted at pleasure. They were not made under a by-law, so that the plaintiff is not in a position to proceed by arbitration for his compensation, and if they were made in exercise of any other powers vested in the defendants, the exercise of those powers was discretionary, and they were bound to use them so as not to create the nuisance in question.

The two other cases cited by Mr. Blake were *Attorney-General v. Acton Local Board*, 22 Ch. D. 221, and *Charles v. Finchley Local Board*, 23 Ch. D. 767. I need not further refer to them than to say that they lay down nothing inconsistent with former cases or with the right of the plaintiff to maintain this action.

I have looked at several American cases which I find referred to at p. 588, 589 of Mr. Justice Cooley's book on Torts. I do not find that they establish anything which really conflicts with the principles of the English cases. On the general question I refer to the case of *Northwood v. The Corporation of the Township of Raleigh*, 3 O. R. 347, reported since the argument.

There remains to be disposed of only the plaintiff's claim for such damages as he has sustained from trespasses committed on his land in deepening the stream.

This damage seems of a trifling nature, and it is said not to be recoverable for two reasons—one being that it is the subject of a claim for compensation and arbitration, and the other that the work was done by an independent contractor, to whom and not to the defendants the plaintiff must look for redress.

The first objection is not raised by the pleadings, nor was it taken at the trial, and we are not disposed to help the defendants by allowing them to raise it for the first time on the re-hearing. We do not, however, think it well taken, as it cannot be said that the damages complained of were such as would necessarily result from the exercise of the corporate powers under the by-law, which, for all that appears, might have been done without the commission of the trespasses in question. If so, such damages may be recovered in an action, and the arbitration clauses do not apply.

And as to the objection that the contractor alone is liable: It is true that a contractor was employed, with whom there was a written agreement. The rule is that "if an independent contractor is employed to do a lawful act, and in the course of the work he or his servants commit some casual act of wrong or negligence, the employer is not answerable:" *Pickard v. Smith*, 10 C. B. N. S. at p. 480; *Serandot v. Saisse*, L. R. 1 P. C. 152. The defendants here have not proved the terms of the contract with Dawson, and I think the evidence falls far short of shewing that he was an independent contractor. I find it stated by the

defendant's witnesses, or by members or officers of the council, past or present, that the drain committee had the work in charge: that the work was done by Dawson under the superintendence of the members of the council, who formed the drain committee, and staked out the work for him in conjunction with their engineer, Campbell, and that Dawson was indemnified against any trespasses he might commit in the execution of the works.

Evidence of this kind, in my opinion, justifies the finding that the defendants were answerable for Dawson's acts.

On the whole I think the decree is right and should be affirmed, with costs.

See also *Wright v. Williams*, 1 M. & W. 77; *The Queen v. North Midland R. W. Co.*, 2 Eng. Railw. and Canal Cas. 1; *Little v. Dublin and Drogheda R. W. Co.*, 7 Ir. C. L. 82 (1857); *Lillywhite v. Trimmer*, 36 L. J. Ch. 525; *Clowes v. Staffordshire Potteries Waterworks Co.*, L. R. 8 Ch. 125; *In re Yeomans and the Corporation of the County of Wellington*, 43 U. C. R. 522; *Stonehouse v. The Corporation of the Township of Enniskillen*, 32 U. C. R. 562; *Monks v. Dillon*, 12 L. R. Ir. 321.

FERGUSON, J., concurred.

A. H. F. L.

[CHANCERY DIVISION.]

CLARKE V. CORPORATION OF THE MUNICIPALITY OF THE
TOWN OF PALMERSTON.

Corporation—Mandamus to levy sinking fund—R. S. O. ch. 180, sec. 88—46 Vic. ch. 18, sec. 359.

Where a municipal corporation issued debentures under authority of certain by-laws which required a sinking fund to be raised each year to provide for payment of the principal at maturity, but the corporation omitted to raise such sinking fund.

Held, that they should be compelled by *mandamus*, on the application of a debenture holder, to raise the sinking fund for the current years, and that proceedings were properly taken against the corporation, and not the clerk of the municipality, notwithstanding R. S. O. ch. 180, sec. 88. For that enactment must be taken in connection with 46 Vic. ch. 18, sec. 359, and the clerk is not to insert in the collector's roll any sums which the council has not directed to be levied.

Held, however, that the *mandamus* could not include the levy of the rate for a sinking fund in future years, nor *semble* the levy of arrears.

The not levying a rate for the sinking fund is an annual breach of duty, and upon any breach a right arises to have it corrected.

THIS was a motion by one William Clarke, who applied on behalf of himself and of all others who were debenture holders of the corporation of the town of Palmerston, and as a ratepayer, for a mandamus directed to the mayor and council of the corporation of the municipality of the town of Palmerston, ordering and compelling the said mayor and council (1) to include in the estimate by-law for the current year (1883) and to levy and collect, or cause to be levied and collected the sinking fund leviabale for the year 1883, on all the debenture debt of the said corporation; (2) to compel the said council to levy and collect the arrears of the sinking fund not levied in former years; (3) or to levy such a rate as would not exceed two cents in the dollar, exclusive of school rates, applying such portion of said rate as should exceed the amount for ordinary expenditure towards the arrears of sinking fund; (4) to continue the levying and collection of the two cent rate, similarly applying the excess until all arrears of sinking fund should be made up, without incurring any debt for extraordinary purposes in the meantime.

In his affidavit in support of his motion, the applicant alleged that he was the holder and absolute owner of debentures numbers 14 and 15 of the denomination of \$1,000 each, issued by the corporation of the town of Palmerston, under a certain by-law of the said town, which was passed in aid of the construction of the Stratford and Lake Huron Railway, and that the total amount of debentures issued under the said by-law was the sum of \$15,000: that the total debenture debt of the said town amounted to \$48,017, irrespective of debentures issued for school purposes, amounting to the sum of \$640: that he was informed and believed that all the by-laws under which the debentures forming the said total indebtedness of \$48,017, had been issued, required that a sinking fund should be raised in each year, and invested so as to provide for payment of the principal of the said debentures, when and as the same should mature: that he was advised and believed that the law required that all by-laws passed by municipal corporations for raising money, necessitate the raising of the yearly sinking fund for the protection of the debenture holders: that he was a ratepayer of the said municipality: that he was informed and believed that the council of the said corporation had not raised and levied any sinking fund whatever at any time since the date of the issuing of the debentures under the said by-law in respect of the debentures issued thereunder, and the whole of the sinking fund leviable thereunder was in arrear, uncollected, and unpaid: that he was informed and believed that the council of the said corporation had not raised and levied any sinking fund whatever at any time since the date of the issuing of the several other debentures, making up the total aggregate indebtedness as aforesaid, in respect of the debentures so issued, and the whole of the sinking fund leviable thereunder was in arrear, uncollected, and unpaid: that he had applied through his solicitor to the council of the said corporation, and had demanded that the said council should raise the arrears of the sinking fund, and the sinking fund for the current year, but the

said council had taken no notice of his application, and neglected and refused to raise and collect the said arrears and the said sinking fund for the current year; that he was apprehensive, from the neglect of the council in past years and during the present year to raise and collect the said sinking fund, that the same would remain uncollected this year unless the council was ordered so to do by a peremptory writ of mandamus issued out of this honourable Court; and that he was apprehensive that the security which the law provided for him as a debenture holder by the compulsory yearly raising and collection of the sinking fund would be endangered by the neglect and refusal as aforesaid of the council to raise the sinking fund.

The rest of the facts of the case sufficiently appear from the judgment.

The motion was made on June 30th, 1883, before Proudfoot, J.

Kingsmill and *A. M. Clarke* for the applicant. The corporation have not performed their duty, and the *mandamus* should issue: *VonHoffman v. City of Quincy*, 4 Wall. 535; *United States v. Keopeck*, 6 Wall. 514; *Stephens' Corp.* (1877), p. 574-6; *Boone on Corp.* 155; *State v. Milwaukee*, 25 Wis. 122; *Board of Commissioners of Knox Co. v. Aspinwall*, 24 How. 376; *Dillon on Mun. Corp.*, 2nd ed., pp. 685, 776.

C. Robinson, Q. C., and *Guthrie, Q. C.*, for the defendants. The application is wrong in form, and is wrongly directed. The application should have been for a *mandamus* to the clerk, not to the municipal council. It is the clerk's duty to frame the roll, and put the rate in the collector's roll without any direction: *Har. Mun. Man.*, p. 692; *R. S. O.* ch. 180, sec. 88; *Grier v. St. Vincent*, 13 Gr. 512; *Fletcher v. Municipality of the Township of Euphrasia*, 13 U.C.R. 129. The defendants have never refused that for which a *mandamus* is sought. The mayor's affidavit is a complete answer to that application. Moreover, the creation

of a sinking fund is almost universally neglected, and if tax-payers of this year are compelled to pay for past years, that will be unjust: see *The Corporation of the County of Frontenac v. The Corporation of the City of Kingston*, 30 U. C. R. 584. Besides, the plaintiff is barred by his *laches* and acquiescence. He has been a rate-payer for years, and has done nothing, although the rate has not been levied. His agreement with the defendants is an acquiescence, and precludes him from objecting. The council, moreover, has no power to levy a rate for the past sinking fund: *Harr. Mun. Man*, 4th ed., p. 268, s. 342; *ib.* p. 263, s. 340; *Greer v. St. Vincent*, 13 Gr. 512.

Kingsmill, in reply. We are willing to forego the arrears if the rate for the current year is levied. The sinking fund does not form part of the debt falling due within the year. It was the duty of the corporation to levy it; not of the clerk only. The private arrangement with the plaintiff has nothing to do with the matter; it was followed by an invalid by-law: see *Wilkie v. Corporation of Clinton*, 18 Gr. 557; *Cleveland v. Board of Finance and Taxation of Jersey City*, 38 N. J. R. 259; *Rob. & Jos. Dig.*, p. 2221; *Webb v. Herne Bay Commissioners*, L. R. 5 Q. B. 642.

July 4th, 1883.—PROUDFOOT, J.—This is an application for a mandamus to compel the defendants to include in the estimate by-law for 1883, and to levy and collect or cause to be levied and collected the sinking fund properly leviable for 1883, on all the debenture debt of the corporation; and to levy and collect the arrears of the sinking fund, not levied in former years; or to levy such a rate as will not exceed two cents in the dollar, exclusive of school rates, applying such portion of said rate as exceeds the amount for ordinary expenditure towards the arrears of sinking fund, and to continue the levying and collection of the two cent rate, similarly applying the excess, until all arrears of sinking fund are made up, without incurring any debt for extraordinary expenditure in the meantime.

In 1878 the defendants passed a by-law to aid and assist the Stratford and Huron Railway Company, by granting a bonus of \$15,000, under the authority of 36 Vic. ch. 87, O., sec. 17 *et seq.*; and it provided that for the purpose of forming a sinking fund for the payment of the debentures issued for the bonus and interest, an equal annual special rate of $5\frac{7}{10}$ mills in the dollar should in addition to all other rates be assessed, raised, levied, and collected in each year upon all the rateable property in the municipality during the continuance of the debentures, or any of them.

This by-law was confirmed by the 42 Vic. ch. 66, sec. 11, O.

The plaintiff is the holder of two of the debentures amounting to \$2,000, purchased three or four months since.

This rate for a sinking fund has never been levied.

The plaintiff says he has applied to the defendants through his solicitors, and demanded that they should raise the arrears of the sinking fund, and the sinking fund for the current year, 1883, but they have taken no notice of his application, and neglect or refuse to raise and collect said arrears, and the sinking fund for the current year.

It was objected on behalf of the defendants that the application was misconceived, as it should have been for a mandamus to the clerk and not to the corporation; and reference was made to the 88th section of the Assessment Act, R.S.O. ch. 180 (Harrison's Mun. Man., 4th ed., p. 692,) and to the case of *Grier v. St. Vincent*, 13 Gr. 512. That section provides that the clerk of every municipality shall make a collector's roll, and shall set down the name of every person assessed, and the assessed value of his real and personal property and taxable income, and opposite the assessed value shall, among other things, set down the amount for which the person is chargeable in respect of sums ordered to be levied by the council for any special rate, the proceeds of which are required by law, or by the by-law imposing it, to be kept distinct and accounted for separately.

And *Grier v. St. Vincent*, 13 Gr. 512, determines that this is a duty, a statutory obligation, which a township

clerk owes to the county, and which he is bound to perform even though the township council should forbid him doing it.

But by the Municipal Act (Harr. Mun. Man. p. 263) sec. 340, consolidated 46 Vic. ch. 18, sec. 359, the council of every municipal corporation shall assess and levy on the whole ratable property within its jurisdiction a sufficient sum in each year to pay all valid debts of the corporation, whether of principal or interest, falling due within the year.

If the sinking fund is a debt of principal or interest falling due within the year, the Assessment Act, sec. 88, and the Municipal Act, may well stand together. The council is to assess in each year the sums to be levied, and the clerk is to place them in the collector's roll, and his duty to insert the special rate by the by-law imposing the same required to be kept separate, would be complied with by inserting the sums specified by the by-law of that year. In *Grier v. St. Vincent*, the County Council had directed the sum to be raised the same year that the clerk made the mistake in placing it in the wrong column.

It does not seem to me that the clerk is in any year to insert in the collector's roll any sums which the council has not directed that year to be raised. The council would not know how to limit the rates to be imposed, to keep within the statutory limit, unless it had all the special rates also before it. And in *Wilkie v. Corporation of Clinton*, 18 Gr. 557, it was expressly held that the sinking fund is a debt within the meaning of the Act. Being a debt it is a duty of the defendants to assess for it every year.

This objection fails.

An affidavit has been made by the mayor of the town of Palmerston, prepared apparently under the idea that it was the duty of the clerk to insert the rate for the sinking fund without any further authority from the council than that contained in the original by-law, in which he says that the council have in no way interfered with the clerk

in the performance of his duty in regard to the insertion of special rates in the collector's roll as required by him, and he believes that the clerk will insert them under debenture by-laws leviable for the present year. I think the council have to do something more than stand by while the clerk makes up the roll as to special rates not imposed in the current year, but I do not doubt when so informed that the council will give the necessary authority to the clerk. The mayor further says that the question as to levying the sinking funds during the year 1883, and future years, was before the rate-payers at the last election, and it was well understood by every one in Palmerston that the present council would not interfere to prevent, but would facilitate and promote so far as in their power the levy of the sinking fund rates for and during the present year; the mayor himself was elected on that very issue being in favour of having the sinking fund levied for and during the present year. I hope the council will carry out their intention to facilitate the levy of the rates by inserting them in the by-law assessing the property for debts of the corporation.

I do not think the plaintiff is barred by any *laches* in not applying earlier. The not levying a rate for the sinking fund is an annual breach of duty, and upon any breach a right arises to have it corrected.

I do see my way clear to require the levy of the arrears, and am relieved by the counsel for the plaintiff who does not insist on it. Nor do I think any order should be made as to the levy of the rates in future years. I cannot assume that the council of the municipality will neglect its duty next year.

The agreement between the plaintiff and defendants in July, 1882, by which an exemption from taxation was granted to the plaintiff for eight years from 1889, to terminate in case any one should compel the defendants to raise the sinking fund, does not appear to be any bar to the present proceeding; for the by-law granting the

exemption, has been quashed, and the agreement has ended, and must be treated as if it never had an existence (a).

(a) The agreement thus referred to, was as follows :

" This agreement, made the 3rd day of July, 1882, between William Clarke, of &c., of the first part, and the Corporation of the Town of Palmerston, of the second part. Whereas a by-law hath this day been executed by the said corporation, granting to the said William Clarke and his heirs an exemption from taxes for the term of eight years, commencing from January 1, 1889, upon his property in the said Town of Palmerston, commonly known as the brewery property, more particularly mentioned in the said by-law.

" And, whereas, the said exemption has been granted : firstly, in consideration that the brewery and malting business, introduced and established by the said William Clarke, hath greatly benefited the said Town of Palmerston ; and, secondly, because the said corporation having failed to raise the annual sinking fund required by law on a large portion of their debenture indebtedness, the exemption heretofore granted to the said William Clarke became, by reason of such default, of much less value to the said William Clarke ; and the said William Clarke having threatened to take proceedings against the said corporation to compel them to raise the said sinking fund, the council of the said corporation and the said William Clarke have agreed to compromise and settle their said differences in manner following, that is to say, the said corporation to pass the said by-law in manner and form as therein provided, and the said William Clarke, by this agreement under seal, to undertake and agree that if, at any time prior to January 1, 1889, any person, by proceedings at law or otherwise, shall compel the said corporation to raise the said sinking fund then in arrear, and shall so continue to raise it (*sic*) until January 1, 1889, then the said by-law herein mentioned and enacted on the day of the date hereof shall cease to be operative in his favour, and shall, from thenceforth, be null and void.

" Now, this indenture witnesseth that the said party of the first part, in pursuance of the said recited agreement, and in consideration of the sum of \$1 of lawful money of Canada, now paid to him by the said parties of the second part (the receipt whereof is hereby acknowledged), doth by these presents, for himself, his heirs, executors, administrators, and assigns, covenant, promise, and agree to and with the said parties of the second part, their successors and assigns, that for and notwithstanding the exemption from taxes of eight years by the said by-law to him granted, he shall and will, upon the happening of the events in the recital hereof mentioned, for himself, his heirs, executors, administrators, and assigns, forever, relinquish, forego, and renounce all and every the benefit and advantage of the said by-law and the exemptions to him hereby granted.

In witness whereof, &c.,

(Signed) WM. CLARKE.

(Signed) W. DONNELLY, Mayor.

Some other technical objections were raised which do not seem to me material.

The notice to the defendants was given in May, and though they do not seem to have made any answer to it, I would scarcely have considered that equivalent to a refusal, without which a mandamus ought not to issue (*Sed vide, Hughes v. Mutual Ins. Co. of Newcastle*, 13 Q. B. 153; *In re School Trustees of Otonabee, &c., and Case-ment*, 17 Q. B. 175,) but for the defence made by the defendants, from which it appears they thought there was no duty incumbent on them in regard to the levy of the sinking fund, and therefore that they had no intention of doing what I think is their duty to do.

From the affidavit of the mayor, however, I presume the council will take the necessary proceedings for levying of the rate, and the mandamus will not issue for a month to enable them to do so.

The plaintiff is entitled to his costs, for though he has not got all he asked, yet he has got what the defendants would not give him.

A. H. F. L.

[CHANCERY DIVISION.]

MUNDELL v. TINKIS ET AL.

Absolute deed—Parol evidence—Ratification—Fraudulent purpose—Mortgage or no mortgage.

Where the plaintiff brought an action to redeem a certain property conveyed by him in a deed absolute in form, and it appeared that the deed in question which he now sought to cut down to a mortgage, had indeed been executed by him for the purpose of securing a debt due to the grantee, but that the main object of the transaction was to protect the property from the results of an anticipated action for breach of contract. *Held*, that under these circumstances, evidence was not admissible to rectify the form of the instrument, for this Court never assists a person who has placed his property in the name of another to defraud his creditor; nor does it signify whether any creditor has been actually defeated or delayed.

The decided weight of authority is that after the property passes, whether by the execution of a written instrument or by other means sufficient in law, it is not open for the fraudulent grantor to undo the matter either out of Court or by the aid of the Court.

Symes v. Hughes, L. R. 9 Eq. 497 commented upon.

THIS was an action brought by Edward J. Mundell against Matilda Tinkis, widow and administratrix of the personal estate of James Herman Tinkis, deceased, and the children of the two last named defendants, for the redemption of certain lands.

In his statement of claim the plaintiff set out that the said James Tinkis died intestate on September 13th, 1882: that on April 6th, 1882, he, the plaintiff, being the owner in fee simple of or otherwise well entitled to certain lands therein set forth, did by indenture of that date, for and in consideration of \$1,800 therein expressed, grant and convey the said lands to the said James H. Tinkis, deceased: that the said conveyance, though absolute in form, was intended by him and by the said James H. Tinkis, deceased, to operate as and to have the effect only of a mortgage on the said lands to secure the payment of the said sum of \$1,800: that he, the plaintiff, during the lifetime of the said James H. Tinkis paid him the said sum of \$1,800, and became thereby entitled to, and all things had been done necessary to entitle him to a reconveyance

of the said lands and premises : that he, the plaintiff, was at the time of the execution of the said indenture, and had ever since been, by his tenant, one John Riddell, in possession and occupation of the said lands and premises, and in receipt of the rents and profits thereof ; and he claimed that the said indenture might be ordered to be delivered up to him, and that a reconveyance of the said lands and premises to him might be ordered and decreed by the Court, and for general relief.

By her statement of defence the defendant Matilda Tinkis, denied all personal knowledge of the matters in question. The other defendants, by a joint statement of defence, denied the conveyance in question was intended to have the effect of a mortgage, and alleged on the contrary that it was intended to be and was an absolute indefeasible conveyance of the lands therein contained, for valuable consideration.

The rest of the facts of the case sufficiently appear from the judgment of Boyd, C.

The case was heard on September 22nd, 1883, at Owen Sound, before Boyd, C.

D. A. Creasor, for the plaintiff, cited *Taylor v. Bowers*, L. R. 1 Q. B. D. 291 ; *Symes v. Hughes*, L. R. 9 Eq. 475 ; *Bowers v. Foster*, 27 L. J. Ex. 262 ; *Hastelow v. Jackson*, 8 B. & C. 221.

Lane, Q. C., for the infant defendants, cited *Emes v. Barber*, 15 Gr. 679.

Masson, for the widow.

Regina v. Littledale, 10 L. R. Ir. 86, was also referred to on the argument.

September 29th, 1883. BOYD, C.—The plaintiff's evidence very plainly established that he executed the absolute deed which he now seeks to cut down to a mortgage, for the twofold purpose of securing a debt due to the grantee, and to secure himself against an action for breach of contract, which he anticipated. The consideration mentioned in the

deed is \$1500, and before it was executed he had discharged the debt owing by him to the grantee. so that a balance of only \$200 or \$300 remained due. I think that one main object of the transaction was therefore to protect this property from the claims of an apprehended creditor. The plaintiff continued in possession of the land through tenants, and that fact would be enough in ordinary circumstances to justify the reception of evidence for the purpose of rectifying the form of the instrument. But the insuperable difficulty remains, that the plaintiff's own evidence puts him out of Court. I have always understood the rule of equity to be as expressed by Esten, V. C., in *Phelan v. Fraser*, 6 Gr. 336, that this Court never assists a person who has placed his property in the name of another, in order to defraud his creditor. The transaction was in this case completed by the execution and registration of the deed, and the form of transfer was deliberately adopted with a view to divest the one party of the title and vest it in the other. That is the one fact which distinguishes this case from the case referred to in the argument of *Taylor v. Bowers*, L. R. 1 Q. B. D. 291. That was a decision with reference to goods in respect of which no instrument of transfer had been executed, and in which it was not necessary for the plaintiff to give evidence of the fraudulent scheme, in order to enable him to recover.

The Judges in Appeal treat the case as on all fours with *Bowes v. Foster*, 2 H. & N. 779, and upon turning to that report it will be seen that all the Barons emphasize the distinction that exists between transactions where there is a transfer of the property in fact, and those where the transfer is only in semblance. That is, as I understand the matter, the *ratio decidendi* in *Taylor v. Bowers*. There the fraudulent purpose was not accomplished because there was in law and in fact no change of property carried out. But here the unlawful scheme was consummated so far as it was possible for the actors therein to proceed. Nothing remained to be done; the conveyance was signed, the specified consideration duly handed over from grantor to

grantee in return for the delivery of the conveyance, and thereafter the due registration of the instrument, by which all the world was informed that the plaintiff had ceased to be owner of the property. Having reached this stage, no repudiation on the plaintiff's part could avail to undo the completed transfer, no *locus penitentiæ* was possible.

Taking this view it seems to me that the language of the M.R., in *Symes v. Hughes*, L.R. 9 Eq. 476, is too broad when he says: "Where the purpose for which the assignment was given is not carried into execution, and nothing is done under it, the mere intention to effect an illegal object when the assignment was executed, does not deprive the assignor of his right to recover the property from the assignee who has given no consideration for it."

That decision may be supported on another ground, namely, that it was substantially a suit by the creditor through the assignor to get the benefit of the property assigned. The language I have extracted seems to have the approbation of Cockburn, C. J., in *Taylor v. Bowers*, 1 Q. B. D. at p. 297, when he says that the plaintiff's right to recover depends on this, that the alleged purpose not being here carried out, he is entitled to repudiate the transaction, and to recover back the money or property. He is commenting on *Symes v. Hughes*, in which there was a completed transfer of the property by the execution of an assignment. It is noticeable that the Judges in Appeal do not proceed upon this view, and do not cite with approval Lord Romilly's decision. The question remains, what is carrying out the illegal purpose? And up to what period is repudiation possible? The decided weight of authority and authority in our own Courts which concludes me, is that after the property passes, whether by the execution of a written instrument or by other means sufficient in law, it is not open for the fraudulent grantor to undo the matter either out of Court or by the aid of the Court. As put by Martin, B., in *Burns v. Foster*, 2 H. & N. p. 789, in reference to land transferred in such circumstances, the transferee is guilty only of a breach of honour, and not of legal obligation, in not reconveying.

If it is meant that the illegal purpose is not carried out unless it is proved that some creditor has actually been defeated or delayed, this is imposing an unsatisfactory test, because the act and conduct of the grantor are not affected by the subsequent course of third parties. So far as he is concerned the illegal purpose is complete; he has violated the law, and should not be allowed to resort to the law for protection.

In *Platamone v. Staple*, Coop. 251, (1815,) the Vice-Chancellor Plumer thought that there was sufficient doubt to make it proper to grant an injunction till the hearing to restrain an action at law. That action was brought upon an instrument securing a rent-charge to the defendant in equity, granted to qualify him to sit in Parliament, but which he had never used for that purpose. That case was mentioned with approval by Lord Lyndhurst in 1843, in *Barnard v. Sutton*, 7 Jur. 685, which I do not find in the regular reports, but the decision proceeded upon another ground: See S. C. 12 L. J. N. S. Ch. 312. The case in Cooper was cited in *Symes v. Hughes*, and doubtless influenced that decision. On the other hand, when *Platamone v. Staple*, was cited in *Roberts v. Roberts*, Dan. R. 143, (1818,) Richards, L. C. B. observed at p. 149: "I cannot see the distinction there made as to the deed being used or not." And after consideration he is thus further reported, "That was a mere interlocutory order. * * I cannot act on the authority of that judgment. It appears to me that it is not in the power of a Court of Equity to call back a deed so given."

So in *Groves v. Groves*, 3 Y. & J. 163, Alexander, C. B., was of opinion that the Court will not assist a party in getting back an estate conveyed by him for an illegal purpose. In that case *Platamone v. Staple* was again cited to no purpose, and *Roberts v. Roberts* was not cited. The observations of the Lord Chief Baron are pertinent to this case. He says: "It appears to me that if it turned only on the illegal object of the original transaction, I should act most consistently with law and equity by refusing to interfere,

as Lord Eldon did in *Brackenburg v. Brackenburg*, 2 J. & W. 391. When a grantor, so far as he can, completes the transaction for an illegal purpose, and leaves it in the power of the grantee, during his whole life, to make, at his pleasure, the illegal use of the gift originally intended, he deserves all the consequences attached to the illegality of his act. If the crime is not completed, the merit is not his, and therefore in such a case I should not think myself bound to relieve him against the heir of the grantee. The plaintiff asks for equity, and does not come with clean hands to receive it." (p. 174.) The same point was again before the Irish Rolls in 1837, in *Bateman v. Ramsay*, Sau. & Sc. 459, in which both the cases in *Cooper* and *Daniel* are cited, and it is thus dealt with by Sir Michael O'Loughlen, M. R. at p. 477: "I cannot understand upon what principle it can be contended that a person who intends to commit a fraud shall not have relief if he succeeds in his attempt, but shall be relieved if he fails, or hesitates to proceed because he fears a failure. His intention is as fraudulent in the one case as the other. * * I think that a person who comes into a Court of Equity, stating that he intended to make the proceedings of a Court of Justice ancillary to his fraud, and seeks to obtain the aid of the Court to restrain the proceedings of his associate who takes advantage of those proceedings, ought not to be relieved. I refuse to interfere, not because I think the defendant's case an honest one, but because the plaintiff himself states that which, in my opinion, ought to induce the Court to refuse its interference." The reasoning of this case was adopted and approved of in *Hamilton v. Ball*, 2 Ir. Eq. at p. 194.

I refer, also, to cases in our own Courts: *Rosenburgher v. Thomas*, 3 Gr. 633; *Langlois v. Baby*, 10 Gr. 358, affirmed 11 Gr. 21; *Emes v. Barber*, 15 Gr. 679; *Scoble v. Henson*, 12 C. P. 65.

The cases in the United States are all in the same direction, and no better expression has been given to their result than in the language of Rogers, J., in *Murphy v. Hubert*,

16 Pa. St. at p. 58: "To enable a party to shew a secret trust, in the face of an absolute deed, the purpose must have been an honest one, else, by secret fraudulent device a dishonest man would be sure never to lose, and he has the chance of gaining. It is the policy of common sense and of common law to environ a debtor with all possible perils, and to make it appear that honesty is the best policy: see *Bump's Fraud. Conv.*, 3rd ed., ch. 16." The result is, that I must leave the parties as they have placed themselves, and refuse to interfere. As the defendants are without blame in the matter, being the widow and infant children of the deceased, they should have their costs, and the action is dismissed.

A. H. F. L.

[CHANCERY DIVISION.]

PARADIS ET AL. V. CAMPBELL ET AL.

Will—Construction—“Heirs.”—“Children.”

A testator died in 1847 leaving a will, in which after devising his farm to his wife for life, and at her decease to be divided by his executors between his sisters F. and H. in certain proportions, he continued : And in case either or both of my sisters F. or H. die previous to my decease, then my will is, that each of their portions devised to them/respectively shall be by my executors divided between their and each of their heirs, share and share alike, that is each sister's share to each sister's children, to them their heirs and assigns forever.

The testator's sister H. predeceased him, leaving children, who survived him, and having had also a daughter, who predeceased her, leaving a son, H. H.

Held, that H. H. took no share of the devise to H., for it was clear the testator was using “heirs” in a colloquial and not a technical sense, as meaning “children,” and the legal construction of the word “children” accords with its popular signification, viz., as designating immediate offspring.

THIS matter came up on further directions, after the report of the Master at Kingston, made pursuant to the judgment in this action, dated March 19th, 1883, whereby it was ordered that all necessary accounts should be taken and proceedings had for partition or sale of certain lands, comprised in the will of one George Cook, deceased ; and whereby it was further ordered that the question of the construction of the said will, so far as the same affected the interest of the children of any of the testator's daughters therein named who predeceased the testator, or the descendants of such children, should be reserved until after the said Master should have made his report.

The provisions of the will and other facts of the case are sufficiently set out in the judgment.

This hearing on further directions took place on November 14th, 1883, before Proudfoot, J.

Counsel were permitted to put in written arguments.

F. Arnoldi, for the children of Catharine Hawks, accordingly put in the following :—

The will in question fixes the time for ascertaining the class who are to take the share of Catharine Hawks at the

date of the testator's death. The testator expressly defines what he means by the word "heirs" by saying his devise is to the "children of Catharine Hawks, their heirs," &c. The devise must therefore be read as a devise to the "children" of Catharine Hawks living at the testator's death. Grandchildren are excluded from the benefit of the devise. I refer to *Hawkins* on Wills, Am. ed., p. 84; *Radcliffe v. Buckley*, 10 Ves. 195; *Pride v. Fooks*, 3 DeG. & J. 252; *Theobald* on Wills, 2nd ed., p. 239; *Crook v. Brooking*, 2 Vern. 106; *Reeves v. Brymer*, 4 Ves. 692, followed in *Berry v. Berry*, 3 Giff. 134.

A. J. Williams, for the defendant Henry Hoffman, put in the following:—

The manifest intention of the testator is to benefit the heirs of his deceased sister Catharine Hawks, the concluding words of the clause being explanatory: *Smith v. Smith*, 8 Sim. 353; *Giles v. Giles*, *Ib.*, 360.

November 22nd, 1883. PROUDFOOT, J.—The testator devised his farm to his wife for life, and at her decease to be disposed of by his executors, or the majority of them, in the following manner and form, that is to say, one-third to his sister Elizabeth Fry to her heirs and assigns forever, one-third to his sister Catharine Hawks her heirs and assigns forever; the remaining third part he devised to the lawful children of his sister Hannah Phineas their heirs and assigns forever, to be apportioned and divided by his executors unto them equally, share and share alike. "And in case either or both of my sisters aforesaid, that is, Elizabeth Fry or Catharine Hawks, is or are dead, or may or do die previous to my decease, then and in that case my will and meaning is, that each of their portions bequeathed and devised to them respectively shall be by my executors apportioned and divided between them and each of their heirs, share and share alike, that is, each sister's share to each sister's children, to them their heirs and assigns for ever."

Catharine Hawks predeceased the testator, who died in

1847, having died in 1843, leaving children who survived the testator, and having had a daughter Henrietta, who married Henry Hoffman, and died in 1837, before her mother, and leaving a son Henry Hoffman, who is a party to this suit

The question is, whether Henry Hoffman, the grandson, takes a share with the children of Catharine Hawks.

At the date of the will and at the death of the testator the law of primogeniture had not been abolished. When the testator says in case of the death before him of either or both of those sisters a division is to be made between their and each of their heirs, he seems to use the word heirs in a colloquial and not a technical sense, as meaning children. If it is to be construed in a technical sense, as contended for by the counsel for Henry Hoffman, Henry certainly could get nothing, for his mother could not have been an heir of her mother, who had sons surviving her. The testator himself explains *heirs* as meaning *each sister's children*, and gives that as the interpretation of his language.

A life estate being given to the wife (who lived till 1874), the period of division was upon her death, and the children of Catharine Hawks would be those who survived the widow: *Sunter v. Johnson*, 22 Gr. 249-253; *Jarm. on Wills*, 5th Am. ed., vol. 2, p. 704.

The legal construction of the word "children" accords with its popular signification, viz., as designating the immediate offspring. There are some exceptional cases in which it has been suggested that grandchildren might take under the designation of children, as if there were no children, or where the word is used as synonymous with a word of larger import as *issue*: *Jarm. on Wills*, 5th Am. ed., vol. 2, p. 690. But the circumstances do not exist here, when there are children in existence.

I think Henry Hoffman takes no share of the devise to his grandmother.

A. H. F. L.

[CHANCERY DIVISION.]

CLARKE V. THE UNION FIRE INS. CO.—MCPHEE'S CLAIM.

*Joint contract—Insurance—New contract by one of two joint contractors—
S. O. c. 160, sec. 21, 22.*

J. M. and F. M., his wife, were jointly insured in the defendant's company, whose deposit was being administered under R. S. O. c. 160, secs. 21, 22. On February 4th, J. M., without the assent of F. M., signed and sent to the receiver a claim for rebate as empowered under that Act. No acknowledgment of the receipt of this claim was given by the receiver, who, on February 27th, sent J. M. and the other policy holder a circular notifying them of an agreement for reinsurance, and that if they objected thereto, and desired to claim for rebate, they were to do so before March 15th. On February 24th the property was burnt, and J. M. forthwith claimed for the whole loss.

Held, that neither J. M. nor F. M. were bound by the former's claim for rebate. That it was not a release, but an invalid attempt by one to exercise a joint statutory power; or else an attempt to make a new contract, which was not authorized by one of the parties, and was not accepted by the receiver before the loss occurred.

Granting that a release by one joint tenant would extinguish the right of both, it does not follow that entering into a new agreement by one will prejudice the right of the other.

THIS was a petition relating to a certain policy of insurance, and came before the Court under the following circumstances :

On September 5th, 1881, the Union Fire Insurance Company issued a policy in favour of James McPhee and Fanny McPhee, his wife, on certain property in Arnprior.

On November 29th, 1881, a writ was issued by one A. S. Clarke, who sued on behalf of himself and all other creditors of the company, for administration of the company's deposit in the hands of the provincial treasurer under R. S. O. ch. 160, sec. 21-22, and one Badenach was appointed *interim* receiver, and on January 7th, 1882, judgment was pronounced in the suit, whereby, after reciting that the company had failed to pay an undisputed claim arising, or loss insured against in Ontario for a space of sixty days after being due, whereby the deposit of the company with the treasurer of Ontario had, under R. S. O. ch. 160. sec. 21, become liable to administration and distribution, the Court continued W. Badenach as receiver of the company for the

purposes of sections 21 and 22 of the said statute, and there was a reference to the Master in Ordinary to take an account of the debts and liabilities of the company, and fix priorities of creditors, further directions being reserved.

Shortly after his appointment the receiver notified policy-holders and others to bring in their claims against the company. On February 4th, 1882, James McPhee, at the instance of the agent of the company, but without the knowledge or consent of his wife, signed a claim for rebate of \$5.04 of premium paid on their said policy, and sent it in to the receiver, but never received any notification of the allowance of the claim. On February 24th, 1882, the property insured was destroyed by fire, and the McPhees at once prepared and forwarded to the company and their receiver their proofs of loss, which had never been objected to. On February 27th, 1882, the receiver mailed a number of postal-cards to the various holders, notifying them that an arrangement to re-insure the company's risks had been effected, and that the policy-holders might send in notices, up to the following March 15th, expressing their election as to taking re-insurance or rebate of premium. One of these cards was sent to James McPhee, who immediately replied that he claimed the entire amount of the policy. Notwithstanding this the receiver subsequently entered the claim for rebate on his schedules as allowed, which schedules were filed in Court in May, 1883; and when the claim was brought up before the receiver, on May 16th, 1883, and it was objected, on behalf of the plaintiff and defendant, that a claim for rebate having once been made could not afterwards be withdrawn, he threw out the claim, and refused to allow anything for the loss.

The McPhees then appealed from this decision, and the appeal was heard before Ferguson, J., on September 21st, 1883, when the objection was raised that the receiver had no jurisdiction to entertain a claim for losses occurring after his appointment, and on this ground the appeal was dismissed with costs.

The McPhees then proceeded to prove their claim before

the Master in Ordinary, but upon the objection being raised that a claim for rebate on the same policy had been made and allowed, the Master held that this allowance would have to be got rid of before the claim on the policy could be proceeded with.

The McPhees then presented this petition to the Court, setting out the above facts, and praying that the said allowance of rebate of premium might be struck out of the schedules of the receiver, so that it might not appear that any allowance for rebate of premium existed in their favour, or in favour of either of them, under the said policy, and for all necessary directions and further relief.

The petition was presented on November 7th, 1883, before Proudfoot, J.

A. C. Galt for the petitioners. The policy having been made in favour of both claimants, a claim for rebate by one of them alone was inoperative and void, and the receiver had no authority to allow such a claim. The contract being joint both must unite in acting under it: *Wetherell v. Langston*, 17 L. J. Ex. 338. I also refer to *Marrin v. Stadacona Ins. Co.*, 4 A. R. 330.

W. A. Foster for the plaintiff. A claim for rebate amounted to a surrender of the policy, and the claim having once been filed by the receiver, the statute operated to make it a binding allowance: R. S. O. c. 150.

Bain, Q. C., for the defendants (a). It must be assumed that James McPhee had authority to act for his wife. I refer to *May on Insurance*, ed. 1873, secs. 279, 280, and *Zimmerman v. Woodruff*, 17 U. C. R. 584.

A. C. Galt, in reply, cited *Right v. Cuthell*, 5 East 491, as shewing that a surrender, or an acceptance of a surrender, by one of several joint tenants will not bind the others.

(a) Mr. Bain produced a certificate from the receiver, stating that in consequence of the claim for rebate he had not re-insured the risk.—
R.E.P.

November 23rd, 1883. PROUDFOOT, J.—In this case a policy was made by the company insuring Fanny McPhee and James McPhee on September 16th, 1881. The company afterwards went into liquidation. On January 10th, 1882, an advertisement was published by the receiver to file claims before February 15th. On February 4th an agent of the company procured James McPhee to sign a claim for rebate for unearned premium, which was received by the receiver on February 7th. The property was destroyed by fire on February 24th. On February 27th a circular was sent to James McPhee, by the receiver, notifying the policy holders and all others entitled to claims against the Government deposit, of an agreement for reinsurance of outstanding risks with other companies; and the policy holders were notified if they objected to such reinsurance, and desired to claim for rebate of premium, they were to send in their claims on or before March 15th. No acknowledgment of the receipt of J. McPhee's claim for rebate had been sent to him, and on receipt of this notice he would have been entitled to assume that the company had not accepted or acted upon it. The fire having occurred before the receipt of this circular, on March 1st a telegram was received by the receiver informing him of the loss, and on March 3rd he received notice of loss in triplicate, and on March 14th he received the claim papers, all before the expiration of the time limited by the circular.

The case came before my brother Ferguson, who was not informed, however, that it was a joint policy in favour of Fanny and James McPhee, and he seems to have held that the filing of the claim for rebate was practically a surrender of the policy, and the loss having occurred subsequently, that the insured was not entitled to prove for the loss.

Assuming that to be a correct decision, it does not dispose of the case in the aspect under which it is now presented. The insurance was joint, and granting that a release by one joint tenant would extinguish the right of

both, it does not follow that entering into a new agreement by one will prejudice the right of the other—as here an agreement to substitute a claim for rebate in lieu of the right under the policy. It cannot be placed higher than a power under the statute given to the policy holder; to claim for rebate. But a power given to two jointly cannot be exercised by one. Fanny McPhee denies she gave any authority to James to enter into this new contract, and there is no evidence to the contrary, unless some mistake in notices of appeal which are shewn to have been made by the mistake of the solicitor.

It was said that the receiver acted upon the claim for rebate by not reinsuring. It is difficult to see how that can be since the circular gave to James McPhee, and all policy holders, an option to reinsure and claim for rebate up to March 15th. So that but for the loss a reinsurance might have been effected up to that time.

When the matter was mentioned the other day, I was inclined to think that Fanny McPhee was not, but that James McPhee was, bound by the application for rebate. Further consideration leads me to the conclusion that, under the circumstances detailed above, neither was bound. The act relied on was not a release. It was an attempt to exercise a statutory power which failed, or an attempt to make a new contract which was not authorized by one of the parties, and was not accepted by the receiver before the loss occurred. I refer to *Wetherell v. Langston*, 17 L. J. Ex. 338; *Right v. Cuthell*, 5 East 491.

I allow the appeal, with costs.

A. H. F. L.

[CHANCERY DIVISION.]

CLARKE V. THE UNION FIRE INSURANCE COMPANY.

CLAIM OF THE AGRICULTURAL FIRE INSURANCE COMPANY
OF WATERTOWN, NEW YORK.

*Administration of insurance company's deposit—Receiver's schedule—
Subsequent claim—Re-insurance—R. S. O. ch. 150, secs. 21-22.*

Pending administration of the deposit of the U. Insurance Company under R. S. O. ch. 160, secs. 21-22, and after the completion of the receiver's schedule prescribed by the Act, a re-insurance was effected with the A. Insurance company of all the U. company's risks, in consideration of which the U. company gave the A. company its note. This note not being paid at maturity, the A. company sought to be placed on the dividend sheet of the U. company for dividends accrued or to accrue. *Held*, that it was entitled to the relief asked, for properly viewed the subject of the claim existed before the schedule, though in a different shape, since by the arrangement with the A. company, made with the assent of persons entitled to rebates, the liability of the U. company in respect to rebates was greatly reduced, and to that extent the A. company should be taken to be subrogated to the position of the policy holders of the U. company.

THIS was another petition in the same suit as the one in the preceding report. The facts of the present claim fully appear from the judgment, and the notes appended thereto, read in connection with the report of McPhee's claim (*supra*, p. 635).

The petition was argued on November 15th, 1883, before Proudfoot, J.

Falconbridge, for the petitioners.

Bain, Q. C., for the Union Fire Insurance Company.

Foster, for the plaintiff.

November 21st, 1883. PROUDFOOT, J.—The order for administering the company was made in 1881. The receiver's schedule prepared in December, 1881. The policy holders were all ranked on this schedule.

Afterwards with the assent of all the policy holders a re-insurance was effected with the Agricultural Insurance Company. The agreement for that purpose was made

January 21st, 1882, and by it the Agricultural Insurance Company in consideration of \$4,250, reduced by deductions provided for in the agreement to \$3957.24 agreed to re-insure the whole of the risks of the Union other than one year risks for the remaining period the risks had to run. The risks were re-insured. The agreement was made subject to the approval of this Court, which I am told has been obtained. For the consideration above named the Agricultural took the note of the Union Company at three months from date, January 21st, 1882, with interest at six per cent. per annum. It has not been paid, and the Agricultural Company now ask to be placed in the dividend sheet for the amount of the dividend already declared and for all future dividends (*a*).

All parties are agreed that this was a most advantageous arrangement for the company, and under it they have saved \$7,000, or forty-five per cent. of the unearned premiums they would otherwise have had to pay as rebates to the policy holders, and \$1,200 the Agricultural has also paid for losses.

The only question is, whether the Agricultural can be collocated in the dividend sheet in respect of this sum of \$3957.24, having regard to the provisions of the Act R. S. O., ch. 160, sec. 22.

That section enacts that the Court shall appoint a receiver, who is to call on the company to furnish a state-

(*a*) In this petition the Agricultural Insurance Company set up the agreement of January 21st, 1882, the approval of the Court thereto, the promissory note in question, and that they had in all respects carried out the agreement, but the promissory note had not been paid; and lastly alleged that the Receiver by his report, dated May, 1883, mentioned some of the facts stated in this petition, but did not report as to the payment of the claim of the petitioners or as to the claim ranking upon the deposit of the defendants, the Union Fire Insurance Company; and they prayed a declaration that they were entitled to rank upon the deposit of the said defendants, and that their claims should be collocated and placed upon the dividend sheet for the amount of the dividend already declared, and for all future dividends, and that the said dividend then declared, might be forthwith paid to them out of the moneys in Court at the credit of this cause.

ment of its outstanding policies, and on the policy holders to file their claims the policy holders are entitled to claim a return of premium for unearned risks ; and upon the completion of the schedule to be prepared by the receiver of all judgments against the company upon policies, and of all claims *for re-insurance or for surrender of policies*, then the Court is to cause the securities in the hands of the Government to be sold, &c., &c.

It was suggested that no claim arising after the date of the schedule, December 1881, is entitled to be recognized, and I was referred to *Creighton's Case*, but intended, I presume, for *McPhee's Case*, where my brother Ferguson was said to have held that a loss arising subsequently to the receiver's schedule was not allowed to rank on the deposit. But that was entirely different, for the policy holder had claimed the rebate for unearned premium before the loss occurred and declined to be re-insured, and that I think was equivalent to a surrender of the policy (*b*).

It is apparent, however, that claims may be placed on the schedule which were not on it when the schedule was prepared, for in the case of the rejection of claims by the receiver, and his decision reversed in Appeal, the claim would go upon the schedule. It is true the subject of the claim in that case would have existed before the preparation of the schedule. And so in the present case the subject of the claim existed, though in a different shape. The Union Company were liable for rebates to the amount of \$7,000. By the arrangement made by the Union and the Agricultural with the assent of the persons entitled to the rebates, the Union gets rid of this liability for a sum of \$3757.24, and to that extent I think the Agricultural must be taken to be subrogated to the position of the policy holders. The 22nd section of the statute providing for claims for re-insurance and surrender of policies going upon the schedule, would also appear to favour this conclusion. The re-insurance in this case would practically be a surrender of

(*b*) See *supra*, p. 636.

the policies subject to the payment to the Agricultural of the price of re-insurance.

But the receiver's report of May 28th, 1883, shews that the schedule is not yet complete and closed, owing to certain claims being still in course of contestation.

I think under these circumstances that the Agricultural Insurance Company is entitled to be collocated upon the dividend sheet as asked, and I think the company are also entitled to interest, which was part of the consideration for re-insurance, and if entitled to the principal they are also entitled to the interest. The agreement was for payment in cash, or at the option of the Union Company, by note at three months with interest. The Union Company exercised this option.

The Agricultural is also I think entitled to the costs of this application, and the other parties also, out of the fund.

A. H. F. L.

[CHANCERY DIVISION.]

THE BANK OF TORONTO V. HALL ET AL.

Execution—Partnership and separate creditors—joint estate to joint debts, separate estate to separate debts—Judicature Act 1881, s. 17, sub.-s. 10.

L. having a judgment against a firm of R. & Co., which was in insolvent circumstances, issued execution and directed the sheriff to levy the amount on the separate goods of R., a member of the firm. The plaintiffs having recovered judgment in respect of a certain debt for which, not only R. & Co., but also R. individually was liable, subsequently issued and placed writs in the sheriff's hands, and also directed him to levy the amount on the goods of R. The sheriff sold R.'s goods and applied the proceeds first upon L.'s execution, after receiving notice from the plaintiffs that they claimed the proceeds of R.'s separate property as applicable first to their writ, inasmuch as their judgment embraced the separate liability of R. The plaintiffs then brought this action against the sheriff for a false return.

Held, that the plaintiffs were entitled to judgment, for the rule of the administration of assets in equity (which was also the rule in bankruptcy and insolvency) should be followed here, and the joint estate applied in the first instance to the joint debts, the separate to the separate debts; and this equitable rule must prevail over the legal lien acquired by L. by his execution.

THIS was an action brought by the Bank of Toronto against James A. Hall, sheriff of the county of Peterborough, the London Guarantee and Accident Company (limited), and the Ontario Bank, defendants, claiming to recover a sum of \$603.62 and interest. The plaintiffs alleged that on August 26th, 1882, they recovered a judgment for \$3,034.30 debt and costs against James Elliott and Thomas Willan Robinson, trading as partners, in an action brought against them both as individuals and as a firm; and that on September 4th, 1882, they placed writs of *fi. fa.* in the hands of the defendant Hall against the goods of the said Elliott & Robinson to recover the amount of their said judgment, and owing to the conduct of the defendant Hall, in his capacity of sheriff, followed by a false return made by him, they had lost the said sum of \$603.62, part of their judgment. The plaintiffs also alleged that the Ontario Bank had given the defendant Hall a bond indemnifying him and his sureties against all loss, damages or expenses which they might be

put to by reason of the conduct complained of, and that the Ontario Bank were joined as defendants in this suit at the request of Hall, who claimed to be indemnified by them in respect of any judgment recovered against him in this action, while the Guarantee Company were joined as the sureties of Hall in his capacity as sheriff pursuant to statute, and as having given a bond in that behalf.

The rest of the facts of the case are sufficiently stated in the judgment of Proudfoot, J.

The case was heard at Peterborough, on October 16th and 17th, 1883, before Proudfoot, J.

S. H. Blake, Q. C., for the plaintiffs: The sheriff was put upon enquiry, and was bound to know what he might have found out on enquiry, and the judgment would have told him that Lightbound's claim was a partnership one. The sheriff knew who composed the firm. The rule as to the respective liability of partnership and private funds has not been altered: *O. J. Act 1881, R. 346*; *Davis v. Morris*, L. R. 10 Q. B. D. 436; *Munster v. Railton*, ib. 475. The sheriff exercised his own judgment and disregarded the warning of the plaintiffs' solicitor. He should have sold the goods in the ordinary way. I refer to *Partridge v. McIntosh*, 1 Gr. 50; *Taylor v. Jarvis*, 14 U. C. R. 128; *Flintoff v. Dickson*, 10 U. C. R. 428; *Wilson v. Vogt*, 24 U. C. R. 635; *Clark v. Corbett*, 27 U. C. R. 161; *Dennis v. Whetham*, L. R. 9 Q. B. 345; *Rowe v. Jarvis*, 13 C. P. 495; *Bank of Montreal v. Munro*, 23 U. C. R. 414; *Garbet v. Veale*, 5 Q. B. 408; *Taylor v. Fields*, 4 Ves. 396.

G. T. Blackstock, for the defendant Hall. The sheriff was not bound to go behind the writs of *fi. fa.*: *Shaw v. Crawford*, 4 A. R. 371. If the execution was wrong, it was an irregularity, and the plaintiffs should have moved against it. See *Lind* on Partnership, 4th ed., p. 515. When a seizure takes place on a writ it cannot be displaced by any subsequent writ. The sheriff was not bound to know that Robinson & Co. meant Robinson &

Elliott. Rule 41 O. J. Act 1881 (MacLennan 1st ed. p. 111) rather favours the position of the sheriff. Though the note on which the plaintiffs sued involves the separate responsibility of the members of the firm, yet the money all went into the partnership.

S. H. Blake, Q. C., in reply: The sheriff here had notice.

At the conclusion of the argument the learned Judge found that the sheriff knew who composed the firm of T. W. Robinson & Co., and had notice from the form of Lightbound & Co's writ against Robinson that it was for a firm debt; also that he knew before the sale that the plaintiffs claimed the proceeds of the furniture as applicable to the execution, and was told why they so claimed it, but he reserved the question whether where there was an execution against a firm, and also an execution against one partner, the sheriff could upon the execution against the firm seize the private property of the individual partner without regard to private creditors of the individual partner. In other words, whether the rule applicable to such a case in bankruptcy applies also to executions in the hands of the sheriff.

Afterwards on January 9th, 1884, the learned Judge gave judgment as follows:

This is an action brought against the sheriff of Peterborough for a false return. The Bank of Toronto are made defendants because they have given a bond of indemnity to the sheriff.

As the bond of indemnity does not apply to the separate property of Robinson taken in execution, the proceedings at the trial were confined to that aspect of the case, leaving the action, so far as regards the partnership property, to be proceeded with when the bank shall have produced certain letters they have declined to produce, or it is ascertained they are not liable to produce them: (O. J. Act, Rule 256.)

Thomas Willan Robinson and James Elliott were partners as grocers and also as lumbermen, and incurred

liabilities as partners, and also as individuals. They became unable to pay their debts in both capacities. Judgments were obtained against them. The first execution in the sheriff's hands was one at the suit of Lightbound & Co. upon a judgment recovered against T. W. Robinson & Co., and directed the sheriff to levy the amount of the goods and chattels of T. W. Robinson. The second was one at the suit of the Bank of Montreal upon a judgment recovered against James Elliott and Thomas Willan Robinson and directed the sheriff to levy the debt out of their goods. The debt for which the plaintiffs obtained judgment was the separate debt of Robinson upon a note made by Elliott to T. W. Robinson & Co. and indorsed by T. W. Robinson & Co. and by Robinson, which Robinson discounted with the plaintiffs. The plaintiffs have recovered the larger part of their claim out of the partnership assets, which they had a right to do as they had the liability of the firm as well as the individual partners; the balance they now seek to recover is some \$605, and interest.

The sheriff seized the furniture of Robinson, his separate property, and sold it to Lightbound & Co. It was of more value than the sum now claimed, and Lightbound & Co. gave credit for the amount on their execution. The sheriff returned the plaintiffs' writ *nulla bona* as to the residue beyond the sum realized out of the partnership assets.

I find that the sheriff knew who composed the firm of T. W. Robinson & Co.: that he had notice from the form of Lightbound & Co.'s execution that it was for a partnership debt: that he knew before the sale that the plaintiffs claimed the proceeds of the furniture as applicable to their execution, and was told the reason why they so claimed it, viz: that their judgment and execution embraced the separate liability of Robinson, and that it had priority over an execution against the firm.

Upon the argument the principal ground of discussion was, whether under the circumstances above set out the execution against the separate property of Robinson, though subsequent to the execution of Lightbound & Co. against Robinson upon a judgment against the firm, had priority over it or not.

The question is one of considerable difficulty.

It is clear that upon a joint judgment against partners the separate property of the partners may be seized: *Par-*

sons on Partnership, 2nd ed., p. 363 (n)l., and the cases there cited.

And on the other hand, where there is a separate judgment against a partner, only his interest in the partnership, after satisfaction of the partnership debts, can be sold: *Dutton v. Morrison*, 17 Ves. 193, 205.

It has also been determined that, in bankruptcy or insolvency, and in the administration of assets in equity, the joint estate is applied to the joint debts, the separate to the separate debts; the surplus of each to come in reciprocally to the creditors remaining upon the other. *Ex parte Elton*, 3 Ves. 238, 241; *Gray v. Chiswell*, 9 Ves. 118; *Lodge v. Pritchard*, 1 DeG. J. & S. 613; *Baker v. Dawbarn*, 19 Gr. 113; *Ridgway v. Clare*, 19 Bea. 111.

The cases in the American Courts are numerous, and follow various lines of decision. Judges of distinguished ability have come to different conclusions on the subject. The English rule in bankruptcy and in administration of assets has received a wider scope in the United States, and applies in some of the States whenever a levy for a joint debt is brought in conflict with a levy for the separate debt of a partner. It has been urged against this rule that the superior right of the joint creditors to the partnership assets is no reason for excluding them from another fund on which they have an equal claim. Their priority grows out of the lien of the firm upon the partnership property; but there is no such ground for preferring the separate creditors in the distribution of the private property of the partners. It is conceded that during the life-time of a partner the obligations of the firm are also his, and equity cannot regard this as ceasing to be true at his death, because in equity partnership debts are joint and several. The rule in bankruptcy is one of positive law, and peculiar to the statutory jurisdiction in which it originated. It should not therefore be applied when assets are brought into a Court of Chancery for distribution on equitable principles. Still less does it afford a precedent for postponing a levy on the separate estate of a partner for a joint debt to a subsequent levy by a separate creditor. But the rule is now adopted, notwithstanding the cogency of this reasoning by the Supreme Court of the United States, and by a majority of the State tribunals.

The variety of the decisions in several of the State Courts arises from the fact that law and equity were not administered in the same Courts, and from the

prevailing efficacy of the rule that *æquitas sequitur legem*. Thus in *Cleghorn v. Bank of Columbia*, 9 Geo. 319, the Court treated the priority of the separate creditors to the separate estate as indubitable where the question arises in the administration of an insolvent estate, but held that it does not afford a ground for setting aside an execution which has been levied on the separate property by a partnership creditor. But the Court treated it at all events only as an equity to be administered in a Court of Equity, and that equity will never be enforced to take away a right acquired by legal execution by joint creditors against separate estate. And in *Allen v. Wells*, 22 Pick. 450, the preference of partnership creditors over partnership property in Massachusetts is admitted, but the like privilege is denied to separate creditors over separate property at law, and the better opinion is said to be that the joint creditors can be restrained from proceeding against the separate estate only in equity. The same rule seems to prevail in New York. It was held in *Meech v. Allen*, 17 N. Y. 300, that although the separate creditors are entitled to priority in the distribution of equitable assets, a Court of equity never assumes to exercise the power of setting aside or in any way interfering with an absolute right of priority obtained at law. In regard to all such cases the rule is *æquitas sequitur legem*. To the same effect are *Wilder v. Keeler*, 3 Paige 171, and other cases.

In New Hampshire a different view prevails, where a levy for a separate debt on the private estate of a partner, has precedence of a prior levy for the debt of the firm. Neither creditor is a purchaser, and the mere circumstance that one is first in point of time does not preclude the Court from moulding the execution of the writs in conformity with the requirements of justice : *Jarvis v. Brooks*, 3 Foster (N. H.) 136. The Court there said, at p. 147: "If the preference is admitted in favour of the joint creditor, but denied to the separate creditor, the principle of equality and reciprocity upon which the interference of equity with the legal rule has been vindicated in England wholly fails. At law the separate creditor might take his debtor's moiety in the partnership estate, and sell it for his debt. When he comes to assert this legal right equity interposes with the rule that partnership debts must first be paid out of the partnership property, and in answer to his complaint that equity has taken from him his legal right,

he may be told in England that equity, by way of compensation, has given him a corresponding preference in the application of his debtor's separate estate. We have admitted the equitable rule which takes away the separate creditors' legal right to satisfy the debt upon an undivided moiety of the partnership property. Principle, consistency, and equal justice to the separate creditors would seem to require that we should also adopt the other branch of the same equitable doctrine, and as there is no greater difficulty in administering one branch of the doctrine than the other, both may be directly asserted at law with equal convenience."

It will be seen that generally where the prior right of the separate creditor is denied it is said to be because it is only an equity, and to be enforced in a Court of Equity, or because *aequitas sequitur legem*.

In *Story's Eq. Jur.* sec. 675, it is said that the separate creditors of each partner are entitled to be first paid out of the separate effects of their debtor, before the partnership creditors can claim anything, which can be accomplished only by the aid of a Court of Equity.

Both law and equity are administered in this Province in one Court, and if the separate creditors have an equity, as it seems they have, effect can be given effectually to it in this proceeding,

The other objection, that equity never assumes to exercise the power of setting aside or in any way interfering with an absolute right to priority obtained at law, is said to rest on the maxim that equity follows the law. The passage I have quoted from *Jarvis v. Brooks*, 3 Foster 136, appears to me to answer this objection. But there is an additional ground for obviating it in this Province, viz: that the maxim is here reversed, and it is no longer *aequitas sequitur legem*, but *lex sequitur aequitatem*. The Jud. Act sec. 17, sub-sec. 10, enacts that generally in all matters not thereinbefore particularly mentioned in which there is any conflict or variance between the rules of equity and the rules of the common law with reference to the same matter, the rules of equity shall prevail. Now if it be a rule of equity that separate creditors have a prior right to the separate property then that must prevail over the legal lien which it would be inequitable to enforce. There is no greater sanctity in a legal right acquired by an execution than in one acquired in any other way, yet equity is constantly in the habit of interfering with such rights and moulding them to the requirements of justice.

Numerous illustrations of the effect of this provision of the Judicature Act may be found in the books. Thus at law an executor was chargeable with the goods of his testator if he failed properly to dispose of them, even though they had been lost : *Crosse v. Smith*, 7 East 246. The rule was otherwise in equity, which did not hold an executor liable for goods of which he had been robbed unless guilty of negligence : *Jones v. Lewis*, 2 Ves. Sen. 240, 241. Under the Judicature Act the rule at law as well as in equity is, that an executor is in the position of a gratuitous bailee, and cannot be charged with the loss without wilful default, *Job v. Job*, L. R. 6 Ch. D. 562. Several other instances may be found in *MacLennan's Judicature Act*, 1st ed., p. 30. Two of them referred to there are particularly applicable to the present. One is noted in the Weekly Notes, 1875, p. 203, and the other in the Weekly Notes, 1876, p. 64, where it was held that a legal lien acquired by execution over chattel property must give way to the equitable right under a bill of sale passing after acquired property.

In some of the cases before Lord Eldon that have been referred to, executions levied before the bankruptcy preserved a priority. This was an express provision of the Bankrupt Act of King James (21 Jac. 1, c. 19, s. 9) declaring that no creditor should receive more than a ratable part of his debt except in respect of an execution served and levied before the bankruptcy. This priority was with some modification preserved by 6 Geo. IV. c. 16, s. 108. Our Bankrupt Act of 1843 (7 Vic. c. 10) granted priority to executions executed and levied before the bankruptcy. The Insolvent Act of 1865, 29 Vic. c. 18, s. 13, protected executions that were in the sheriff's hands thirty days before insolvency. The Act of 1869, 32-33 Vic. c. 16, s. 59, limited the protection to cases where money was levied and paid over before the assignment or compulsory liquidation. The application of the assets of bankrupts and insolvents was regulated by the Act of 1843 (s. 44) more concisely repeated in the Act of 1867 (s. 64) and in the Act of 1875 (s. 83) by which the joint estate was set apart for the joint creditors, and the separate estate for the separate creditors. This is the rule introduced into equity, and it has become an integral part of equity jurisdiction, and will be administered whether there be an existing Bankrupt or Insolvent law or not.

Some confusion has arisen from an expression found in many of the books, that a partnership debt is both joint and

several, and so that there can be no superior equity in a separate over a joint creditor. Thus in *Pomeroy's Eq. Jur.* vol. 1, p. 478, s. 409, it is said that "equity declares, as a general rule, that every merely joint debt at law shall be regarded, as against the debtor parties, a joint and several undertaking, creating a joint and several obligation." The English cases to which he refers, however, do not go beyond instances of the death or insolvency of one of the parties, and the general rule must be confined to these, and that only in a qualified manner. *Devaynes v. Noble*, 1 Mer. 529, 562, 564, and cases of that class, where joint creditors were allowed to proceed at once against separate estate of a deceased partner, is confined to cases where they do not come into competition with separate creditors: *Parsons on Partnership*, 2nd ed, 361, note (J). And in *Kendall v. Hamilton*, 4 App. Cas. 504, it is decided that a contract joint at law is equally joint in equity. And the expression that a partnership debt is in equity joint and several is explained by Lord Cairns as being only a compendious expression which must be interpreted with reference to what were the functions of a Court of Equity as to partnership debts: "When a member of the partnership died the debts became, in the eyes of a Court of Law, the debts of the survivors; but the survivors, on the other hand, in a Court of Equity, had the right, as against the estate of a deceased partner, to say that his representatives should not withdraw any part of the partnership property until all the debts were paid and provided for. If, therefore, a Court of Equity was administering the assets of a deceased partner it would, in order to clear his estate, ascertain his liabilities to the partnership, and for this purpose would ascertain the debts due from the partnership at his death. From this the transition was easy to giving the creditors of the partnership a direct right, and not merely an indirect right through the surviving partners, to come for payment against the assets of the deceased partner; and from this again the transition was easy to the expression which said that partnership's debts, in the eye of a Court of Equity, were joint and several." Lord Hatherley and Lord Selborne express themselves to the same effect, and the cases above quoted show that whether in the administration of assets arising from death or insolvency the same rule prevails—the joint estate to the joint debts, the separate estate to the separate debts.

There will therefore be judgment for the plaintiff for \$605, and interest, against the sheriff.

A. H. F. L.

[CHANCERY DIVISION.]

BANK OF TORONTO V. HALL.

Execution against individual members of a firm—Execution against the firm—Priorities between.

R. & E. were partners in business, and became financially involved. L., R. & Co. obtained a judgment against the firm for a firm debt, and placed the execution in the sheriff's hands, with a direction to levy of the goods of R. Subsequently the plaintiffs obtained a judgment against R. and E. individually and as members of the firm, and placed their execution in the sheriff's hands. The sheriff made the greater part of the amount of the plaintiffs' execution out of the assets of the firm, and returned it "*nulla bona*" as to the residue, although, while the plaintiffs' execution was in his hands, he had sold the furniture of R., being his individual property, and applied the proceeds upon the execution of L., R. & Co., which was first in his hands; and notwithstanding that the plaintiffs' solicitor had notified him that the plaintiffs claimed the proceeds of the furniture as applicable to their execution only.

Held, (reversing the judgment of Proudfoot, J., *ante* p. 644, PROUDFOOT, J., dissenting) that the plaintiffs could not recover against the sheriff for a false return: that the property of the individual partners was liable on a judgment against the firm; and that the plaintiffs were not entitled to priority over the first execution, because their judgment was against the partners as individuals as well as members of the firm.

Per PROUDFOOT, J., the rule that the joint estate is for joint creditors, and the separate estate for separate creditors, is not confined to cases of bankruptcy and the administration of assets on the decease of a partner, and there are various ways in which the question may be raised in equity. Although it may be proper enough to give a creditor the benefit of his diligence, where the contest is between several creditors of the same debtor, with no equity arising from the nature of the property taken in execution, or from the nature of the rights involved, no such preference should be given where it works the injustice of depriving the separate creditor of the benefit of the property of his debtor.

By the effect of the Judicature Act all distinction between legal and equitable debts and legal and equitable remedies is abolished. Debts of every kind are now recoverable in one *forum*, and the same *forum* enables creditors to reach every kind of assets, whether formerly legal or equitable, and the necessary result is, that the distinction between legal and equitable assets is at an end, and upon this subject the rules of law and equity being at variance, the latter are to prevail.

THIS case (reported *ante* page 644) came up by way of appeal to the full Court from the judgment of Proudfoot,

J., and was argued on February 23rd and 25th, 1884, before Boyd, C., and Proudfoot and Ferguson, JJ.

G. T. Blackstock, for the defendant Hall (the sheriff) who appeals. In the event of this case going to appeal, the defendant takes the objection that he was entitled to notice and he got none, notwithstanding the decisions in *McWhirter v. Corbett*, 4 C. P. 203, and *Archibald v. Haldan*, 30 U. C. R. 30. The finding that a verbal notice was given cannot be objected to, unless a presumption arises in favour of the sheriff against the attorney, who says he gave such a notice, but did not reduce it to writing. The sheriff's duty was to do as the writ commanded him, and he was not bound to enquire as to anything anterior to the writ, in fact he is not in a position to make such enquiry. The rule that the joint creditor has priority over the separate creditor as to the partnership property, and *vice versa*, only applies in cases of insolvency, and administration: *Story on Partnership* s. 376 and the propriety of the rule is questioned in s. 382. The right is a partner's right and not a creditor's. The doctrine has its existence only where funds are being administered. The levy on an execution is not disturbed by any equitable doctrine. The two cases of *Jarvis v. Brooks*, 3 Foster (N. H.) 136, and *Murrill v. Neill*, 8 Howard (Sup. C.) 414, relied upon in the judgment in appeal were cases where assets were being administered. I refer to *Cleghorn v. Insurance Bank of Columbus*, 9 Georgia 319; *Gilluspy v. Peck*, 46 Iowa 461; *Allen v. Wells*, 22 Pickering 450; *Kendall v. Hamilton*, 4 App. Cas. 513; *Case v. Beauregard*, 99 U. S. Sup. C. 119; *Schmidlapp v. Carrie*, 55 Mis. U. S. Dig. 1879, p. 587; *Wisham v. Lippincott*, 1 Stockton N. J. 353; *Davis v. Howell*, 33 N. J. Eq. 72, *Meech v. Allan*, 17 N. Y. App. 300. If the rule is adopted, it must be adopted in its integrity, and the creditor is put to his election: *Ex p. Bevan*, 10 Ves. 106; *Lindley on Partnership*, 4th ed. 1208. The notice given by the plaintiffs was only that of an election to be considered individual creditors. The action

is tort, and damages must be shown. As partnership creditors they got a large sum out of the partnership assets in priority to the other partnership creditors and have not sustained any loss: *Lindley* 1208; *Tucker v. Oxley*, 5 Cranch., S. C. 34. There are creditors, both joint and separate, unsatisfied, and injustice has been done. There has been no damage to the plaintiffs as both the executions of Lightbound, Ralston & Co. were prior to theirs. As to the rights of joint and several creditors I refer to: *Ex p. Elton* 3 Ves. 238; *Ex p. Ruffin*, 6 Ves. 119; *Ex p. Williams*, 11 Ves. 3; *Taylor v. Fields*, 4 Ves. 396; *Barker v. Goodair*, 11 Ves. 78.

Robinson, Q. C., with him *Edwards*, for the plaintiffs. *Pollock's Digest of the Law of Partnership* Art 75, p. 106, shows that the true rule has long been a subject of discussion both in England and America. In bankruptcy, insolvency and administration there is no doubt about it: *Meech v. Allen*, 17 N. Y. 302. If a creditor had an equitable right of priority it would be different. If this question had arisen before the Administration of Justice Act, R. S. O. c. 49, and the Judicature Act, 44 Vic. c. 5, O., had been passed, the American decisions, cited by Mr. Blackstock might have supported his contention; but they are not English decisions on the points. See *Story's Eq. Jur.* s. 678, O. J. A. s. 17 sub-s. 10. If the sheriff had interpleaded, the plaintiffs would have got the money, and they cannot lose their rights because he has taken the law into his own hands. The plaintiffs' strong point is the notice to the sheriff: *Jarvis v. Brooks*, 3 Foster N. H. 136; *Snell's Equity*, 6th ed. 501; *Herman on Executions*, c. 20 O. J. A. s. 17 sub-s. 8. Assuming that the plaintiffs are correct as to their rights in equity, what more could they have done to avail themselves of their position. The finding of the learned Judge settles the question of notice.

Blackstock, in reply. The property in question had been advertised when the plaintiff's writ was received by the sheriff, but all the writs were in when the sale took place. The priority of the joint creditor on the partnership

property rests on the equities between or amongst the partners *inter se*. There is no conflict here between law and equity such as would have existed before the Judicature Act. A member of a firm has the power of hypothecating his property for the partnership debts, and the putting of writ in the hands of the sheriff was the same thing. As to the agreement put in. In any event the plaintiffs have not suffered damages except after the payment of eighty cents on the dollar: *Dorr v. Shaw*, 4 Johnston's Ch. R. 17; *Williams v. Brown*, 4 Johnston 682; *McDermott v. Strong*, 4 Johnston 687.

June 19th, 1884. BOYD, C.—It is a general rule of law, alike indisputable in Courts of Equity and in Courts of law, that the joint creditors of a partnership, upon a judgment against the members of the firm, have the right to sue out execution, joint or several, at their option. In *Abbott v. Smith*, 2 Bl. 949, DeGrey, C. J., says that "the contract when made with partners, is originally a joint contract, but may be separate as to its effects. * * Each is answerable for the whole, and not merely for his proportionable part."

The purport of the usual writ of execution against the partners is, that the sheriff is commanded and is bound to levy upon the separate goods of any one of them. *Ex p. Rowlandson*, 2 Ves. & B. 172; *Miller v. Wynn*, Ell. & Ell. 1075. This common law right is recognized and expressly sanctioned by the Judicature Act (Rule 346). The practice under this new procedure is thus expounded in *Jackson v. Litchfield*, 8 Q. B. D. 474: "The writ of summons is against the firm, and the judgment in accord with the writ is also against the firm, and upon that execution may issue against the firm and against any individual member of it, either without or after leave given to do so." That practice was observed in the recovery of the first judgment of Lightbound & Co. against Robinson & Co., now in question. Robinson & Co. were sued under the firm's name; one of the partners, Robinson, was per-

sonally served and made default; whereupon judgment was signed against the firm under which the first execution against the goods of Robinson was placed in the sheriff's hands. In pursuance of this writ the sheriff seized the household furniture of Robinson (his individual property), and before selling it received verbal notice that the proceeds would be claimed by the plaintiff the Bank of Toronto as subsequent execution creditors in respect of a cause of action against Robinson alone.

I think the evidence warrants the conclusion that the sheriff had actually seized the goods before this notice was given, and indeed before any other writs were placed in his hands. No doubt other creditors might attack a prior execution upon any grounds open to them under R. S. O. c. 118; but here the whole claim of the plaintiffs to priority is based upon the equitable doctrine that, in the special circumstances of this case, they, being separate creditors of Robinson, had a right, so far as Robinson's individual property was concerned, to be preferred to the first execution which was based upon a cause of action against the partnership. The special circumstances are that the firm and the separate members of it were all insolvent; but the firm was still in existence, there was no dissolution of it, and no divesting of its assets or of those of the partners by the appointment of an assignee or a receiver.

I fail to see how, in the absence of an insolvent or a bankrupt law, the fact of the partnership and its members being in financial difficulty should enlarge the field of attack and invest this Court with jurisdiction to deal with the matter, as it might be viewed in the administration of an insolvent estate. I fail further to see how this fact of financial embarrassment on the part of the firm and the partners can impose upon the sheriff the duty of administering the individual and partnership estates taken, or liable to be taken in execution, or require him to apply to this Court so to administer those estates, as if one of the partners was dead, or as if an assignment had been made for

the benefit of creditors. In my opinion this would not be the proper result of the circumstances under consideration before the Judicature Act, and the best proof of it is, that such an application has been hitherto unheard of either in England or in this country, and, so far as I can judge, no change has been made in the law by any of the provisions of that Act.

Lightbound & Co.'s cause of action was, no doubt, against the plaintiffs; that was *sub modo*, as explained in *Kendall v. Hamilton*, 4 App. Cas. 504, a joint and several contract. But "by the law of England where several persons make a joint contract, each is liable for the whole, although the contract be joint."—Per Abbott, J., in *Richards v. Heather*, 1 B. & Ald 35. All the partners being alive, Lightbound & Co. had a right by law to recover from any one upon a joint judgment, and in issuing execution, and making seizure upon separate property of one judgment debtor, they were doing nothing that the law did not authorize. They need to invoke no equitable doctrine to entitle them to the priority secured by their diligence. Such being the circumstances, how can the insolvency of the firm or partners make a difference in favour of the subsequent judgment and execution creditor of the one partner whose furniture was seized under the first execution?

Insolvency is not bankruptcy. Asshewn by the Vice-Chancellor in *Ex p. Janson*, 3 Madd. 231, "though a person may be insolvent, he may yet be able to pay a considerable part of his debts, for insolvency means only that the party is unable to pay all his debts, but in case of bankruptcy his whole property is absorbed by the commission: the effect, therefore, of insolvency and bankruptcy is different."

We are here dealing with a case of legal rights against a judgment debtor who is in possession of property to answer the claim of the first execution against him.

The judgment below proceeds upon the application of the doctrine laid down in *Story's Eq. Jur.* s. 675, that "the separate creditors of each partner are entitled to be first

paid out of the separate effects of their debtor, before the partnership creditors can claim anything." But I venture to think that the principle is not applicable to the present case for many reasons which I will proceed to discuss.

That rule of distribution is confined to cases where an estate is being administered either in bankruptcy or by a Court of Equity, and it becomes essential to anticipate or arrest proceedings at law, with a view to secure that equality of apportionment which is regarded as equitable. This is not a case of that kind. The subsequent creditors notify the sheriff verbally of their claim, and do nothing more until the money has been paid over in satisfaction of the first execution, and then this action is brought against the sheriff, as for a false return. It lay upon the present plaintiffs, if they had any equities, to enforce them in the usual way by an application for an injunction to restrain the sheriff from paying over under the first execution, or for the appointment of a receiver to deal with the assets as the Court should direct. By not doing this the bank left the sheriff free to act upon the legal rights of the parties, and must be regarded as having abandoned their claim to have a preferential distribution for their special benefit. I may observe, in passing, that the principles involved in marshalling assets have no bearing upon this case, which is not that of two funds open to the first execution, as to which there should be an election, so as to leave something for the plaintiffs.

But again this rule of distribution is confined to cases of equitable assets, and it is never applied so as to interfere with existing priorities properly obtained upon legal or other assets. The cardinal rule in the administration of assets is thus laid down by *Story*, Eq. Jur., s. 553: "Courts of Equity follow the same rules in regard to legal assets, which are adopted by Courts of law; and give the same priority to the different classes of creditors, which is enjoyed at law; thus maintaining a practical exposition of the maxim, *Æquitas sequitur legem*. In the like manner courts of equity recognise and enforce all antecedent

liens, claims, and charges *in rem*; existing upon the property according to their priorities; whether these charges are of a legal or of an equitable nature, and whether the assets are legal or equitable." Now it cannot be doubted that the first execution against the chattels of the individual partner bound that property as against the subsequent executions in the contemplation of a Court of equity as well as at law: *Ranken v. Harwood*, 5 Ha. 215, affirmed in appeal; 2 Phil. 22.

The text writers thus discuss the position of affairs we are considering. *Pollock's Digest of Law of Partnership*, p. 76, citing Lindley, says: "The individual partners cannot require a judgment creditor of the firm to pursue his remedy against the partnership property before having recourse to the separate property of the partners; for English law does not recognise the firm as having rights or liabilities distinct from those of individual partners, and a judgment against a firm of partners is nothing else than a judgment against the partners as joint debtors, and is treated like any other judgment of that nature."

The judgment below rests mainly upon the reasoning to be found in a line of decisions which are peculiar to the New Hampshire Courts. The leading case is *Jarvis v. Brooks*, 3 Foster 136, which pushed the doctrine referred to in *Story*, s. 675, to its extreme. But it is to be noticed that the law of that State, in reference to partnership matters, has departed widely from English precedents, and even compared with its sister States, it occupies a position of unique isolation. I quote from 1 *Hare & Wallace's Am. L. C.*, 5th ed., 585, as follows: "This confusion of equitable claims with legal interests, has proceeded so far in the New Hampshire cases, that not only is not a partner's interest in the partnership effects subject to seizure under a common law execution, * * but it has been decided that a partner cannot sell or mortgage his undivided interest in a specific part of the partnership property, but only his general resulting interest in the firm: * * from which it would follow that a general assignment by one

partner of his separate interest in the firm's effects would not be a dissolution of the partnership, contrary to the authorities." The American decisions immensely preponderate against the correctness of the judgment now under review. The citations which I propose to make from some of them are to my mind satisfactory in elucidating the principles which should govern the disposition of this case.

The opinion of Walworth, C., in 1836, was thus given in *Payne v. Matthews*, 6 Paige 19: "If the persons comprising a co-partnership firm are insolvent, the joint creditors of the firm are entitled to payment out of the partnership property in preference to the separate creditors of individual co-partners; and in case of the death or bankruptcy of one of the members of the firm, so that his separate estate cannot be reached at law for the satisfaction of partnership debts, his separate creditors have a corresponding right to priority of payment out of such separate estate."

The same Chancellor reiterates and emphasizes his views in 1848, in *Kirby v. Schoonmaker*, 3 Barbour Ch. R. 49. He there held that: "The co-partnership creditors have an unquestionable right, upon a judgment recovered against all the members of a firm, for a partnership debt, to levy upon the individual property of any one of the judgment debtors, as well as upon the partnership effects; although such debtor should be insolvent, and not have the means to discharge his separate debts. * * It is only, he says, "when neither the joint nor the separate creditors can reach the property of their debtors, so as to obtain satisfaction by execution at law, that the equitable principle is applied of paying joint creditors out of the partnership property, and individual creditors out of the separate property of their debtors, where there is not enough to pay both." Ten years later, in 1858, the same views are enunciated by the Court of Appeals in New York in *Meech v. Allen*, 17 N.Y. 300, in this manner: "It is a settled rule of equity that as between the joint and separate creditors of partners, the partnership property is to be first applied to the

payment of partnership debts, and the separate property of the individual partners to the payment of separate debts ; and that neither class of creditors can claim anything from the fund which belongs primarily to the opposite class until all the claims of the latter are satisfied. This, however, is a rule which prevails in Courts of Equity in the distribution of equitable assets only. Those Courts have never assumed to exercise the power of setting aside or in anyway interfering with an absolute right of priority obtained at law."

In *Cleghorn v. Insurance Bank of Columbus*, 9 Georgia 319 (1851), the judgment of the Court is, that the equity to restrain joint creditors in favour of separate creditors will never be enforced to control or take away a right acquired by legal execution on the part of joint creditors against the separate estate ; and that : "It is only when the legal recourse of the joint creditors against the separate estate, is terminated, and they have no claim against these assets, except in equity, as in the case of death, bankruptcy, (or perhaps statutory assignment in insolvency) of a partner, that the joint creditors are postponed." This decision was followed in the same state in 1855 in *Baker v. Wimpee*, 19 Ga. 87, when the matter was dealt with as in equity. The motion was to distribute moneys in the hands of the sheriff arising from the individual property of one partner. The competition was between earlier *fi. fas* which were against the firm, and later *fi. fas* against the individual partner. The Court refused to postpone the first writs against the firm to the later ones against the partner because the legal recourse of the first execution creditors had not terminated when the matter was drawn into equity.

The reason thus given for declining to interfere is in substance that which was advanced in argument by Sir Edward Sugden in *Ex p. Moulton*, Mont. & Bli. 35, where he says : "At law both estates, upon a joint and several security, might have been taken in execution. Why not so in bankruptcy ? The reason is, that the fund of the debtor

is no longer open to the diligence of the creditor. All litigation ceases, and the assets are to be distributed equitably among the creditors." See also the language of Wigram, V. C., in *Ranken v. Harwood*, 5 Ha. 221, 222.

The effect of the principle stated in *Story*, s. 675, was also considered by Williamson, C., in *Wisham v. Lippincott*, 1 Stockt. Ch. R. 356 (N. Jersey, 1853). He said: "It cannot apply to creditors who have secured their debts by judgment and execution liens * * if so, it utterly annuls and destroys the principle * * that every partnership debt is joint and several. * * A Court of Chancery may, undoubtedly, when the equities between the partners are to be adjusted, and where the assets are before the Court, and the Court called upon to marshall them, apply such a rule. * * But I have no hesitation in saying, that when a joint creditor of the firm has a judgment, and execution levied upon the separate effects of one of the partners, this Court ought not, in mere compliance with any such rule, as that the separate creditors of each partner are entitled to be first paid out of the separate effects of their debtor before the partnership creditors can claim anything, interfere with such execution, either on the application of any one of the partners, or any creditor of the firm, or separate creditor of any of its members." This case was followed in the Court of Chancery in the same State (New Jersey) in 1880: *Davis v. Howell*, 33 N. J. Eq. 72.

In *Camp v. Grant*, 21 Conn. 59 (1851), the Court says: "It is true that private property may be taken on a joint execution, even to the entire exclusion of private creditors. It is, in truth and equity, a private debt due from each partner absolutely; and hence, if a joint creditor first attaches separate property, he will take precedence in obtaining satisfaction, unless he is defeated by a bankrupt law."

To the same effect in Massachusetts: *Stevens v. Perry*, 113 Mass. 380, (1873) and in Iowa: *Gillaspy v. Peck*, 46 Iowa, 461 (1877).

I make some extracts from a very late case in Maine:

Cunningham v. Gushee, 73 Me. 420 (1882): "The Court ought not to interfere in equity to deprive the respondents of any benefit they may be legally entitled to by their diligence in securing their demands by attachment of the individual estate of one of the co-partners seems to be clear. * * It should be remembered that he who owes as a partner is himself just as much a debtor as though the debt was contracted in his individual capacity. The debt is due personally from each member of the firm. Not unfrequently the partnership creditor relies largely upon the ability to pay and the credit of the individual partners and there are no partnership funds accessible. That he is the creditor of both the partners surely should not postpone his claim to that of a creditor to whom one of them alone is indebted. Clearly the only mode and time for this complainant to claim the aid of the Court in marshalling the assets of the partnership and individual estates, * * would have been by putting the individual estate * * into insolvency in season to dissolve the attachment made upon it. * * * It has often been decided in suits of law that a subsequent attachment by a creditor of the individual partner will not affect the lien acquired by an earlier attachment in favour of a creditor of the copartnership. In all such cases *qui prior est in tempore potior est in jure*. * * We are satisfied that no different rule should prevail in equity in cases, where the distribution of the partnership estate only, is proceeding on equitable principles in insolvency."

The results of the American decisions are well summed up in 1 Hare & Wallace's Am. L. C., pp. 586 and 587, 5th ed., under the heading: "Where the assets have gone into equity for distribution" in this manner. "In equity, while the privilege of the joint creditors, in relation to the joint estate, is unquestionable, it has been a subject of much dispute whether the separate creditors have not a prior claim to the assets belonging to the separate estate. * * * Lord Loughborough spoke of this as a general principle of equity, but in *Ex p. Bauerman*, 3

Deac. 476, 484, Erskine, C. J., declared it to be a rule adopted in the administration of assets in bankruptcy, but not in other cases. In this country, it has been considered as a general equity by some Courts, but by others as a rule peculiar to bankruptcy. * * This much appears to be agreed, in those Courts which recognize this as a principle of general equity; that the equitable exclusion or postponement of joint creditors will not be enforced so long as those creditors have a recourse *at law* against the separate estate; that is, the equity in favour of the separate creditors will not be enforced to control or take away a right acquired by legal execution on the part of the joint creditors against the separate estate; and that it is only where the legal recourse of the joint creditors against the separate estate is terminated, and they have no claim against those assets except in equity, as in the case of the death, bankruptcy (or perhaps statutory assignment in insolvency) of a partner, that the joint creditors are postponed." In *Parsons on Partnership*, (2nd ed., 1870) p. 362, note, referring to the English law of administration of assets, he says: "If there are separate creditors, it seems to be the present equity doctrine that, *as to equitable assets*, if there be no joint fund or solvent partner, whether the separate estate be solvent or not, the separate creditors must first be satisfied out of their fund and the joint creditors take only the surplus, if any." It is pointed out by Earl Cairns in *Kendall v. Hamilton*, 4 App. Cas. 517, that: "The only interposition of a Court of Equity with regard to partnership debts, took place in the administration of the assets, either of the partnership or of a deceased member of the partnership."

But it is said that the Judicature Act makes a difference, and renders inapplicable the doctrines on which I have been proceeding, because now *lex sequitur æquitatem*. But that clause of the Act is not to be regarded as a parliamentary reversal of the ancient maxim in every possible case. It is not by the terms of the Act (s. 17, s.-s. 10) a declaration universally applicable, but only affects cases where

"there is any conflict or variance between the rules of equity and the rules of common law with reference to the same matter."

You must have the one subject matter in respect of which there is a conflict between the two sets of rules, as in the case referred to in *MacLennan*, p. 30, of a bill of sale of after acquired goods. Such an instrument would be invalid at law, but in equity it would be operative—in that case equity prevails and controls the law.

Another illustration may be found in *European Ass. Society v. Radcliffe*, 7 Ch. D. 733.

But here there is not and never was any divergence between the legal and equitable doctrines. Equity never claimed or asserted the right to interfere with a legal priority, legally obtained, attaching to legal assets. That was a matter outside of the plane of equitable jurisdiction, and with which equity has no concern. There is here no legal wrong or injustice which equity is required to redress, and in respect to which an injunction, or other relief, would have been granted before the Judicature Act. Such being the circumstances, the Act has no application, and the action falls to be disposed of upon the well understood principles of the common law, which equity recognizes and respects. See *Winehouse v. Winehouse*, 20 Ch. D. 545.

In my opinion the plaintiffs fail entirely, and their action should be dismissed with costs here and below.

PROUDFOOT, J.—I retain the opinion I expressed when giving judgment, and think the judgment should be affirmed.

There is no doubt, that, generally, when a joint judgment has been given against several defendants, partners, and a joint execution taken out, it may be executed against one only, for each is answerable for the whole, and not merely for his proportional part: *Collyer* on Partnership, 6th ed., sec. 790. That is the rule while the firm and its members are solvent, *i.e.*, able to pay all their debts. And practically there can be no insolvency of the firm without the insol-

veney of all the individual partners, for as long as any one of the partners is solvent he will be held *in solido* for all the debts of the firm, and would pay them without its insolvency. While there are frequently insolvent partners in solvent firms, an insolvent firm made up of solvent partners, *i.e.*, of men able to pay all their joint and separate debts, is impossible. And it is to this general rule that the cases of *Abbott v. Smith*, 2 Bl. 949; *Ex p. Rowlandson*, 2 Ves. & B. 172, and others of that class apply. And it is also the rule in such cases that the individual partners cannot require a judgment creditor of the firm to pursue his remedy against the partnership property before having recourse to the separate property of the partners, or to borrow a phrase from a different system of law he cannot have the benefit of discussion: *Pollock* on Partnership, arts. 56 and 75.

The right of the plaintiffs, however, turns upon the fact that neither the creditors of the firm, nor of the individual partners, can be paid in full; and it therefore becomes necessary to adjust their claims upon the firm property, and against the members of the firm, upon some equitable principle, which shall give to each his due.

If the interest of one partner in a firm is sold upon an execution against him, it effects a dissolution of the firm. *Story* on Partnership, s. 311; that being the necessary consequence of the transfer of the property to the vendee of the sheriff as tenant in common with the solvent partner. An equally effectual dissolution must be produced by the sale of the whole partnership effects when the partners are insolvent. The subject of the firm becomes extinct, all its capital exhausted, and the capacity to carry on business at an end, as completely as the loss of a ship, the sole property of a partnership, mentioned by *Story*, s. 280. At the time when Lightbound & Co.'s execution was placed in the sheriff's hands, there was property of the partnership in existence.

There being no firm in existence, and no property of the firm to be assigned to an assignee, or be collected by a

receiver, we are brought to face the question of the adjustment of the equities of the partners under these circumstances. For I suppose there can be no question that if equities do exist, they should receive full effect. This does not necessarily impose any arduous or unusual duties on the sheriff. He need not adjust these equities himself, he may simply hold his hand; but if instead of remaining quiescent he chooses to decide the matter and hand over the money to one of the claimants, he must abide the result.

That such a mode of procedure is unheard of in England does not dispose of the case. For there usually the intervention of a Court of bankruptcy decides the rights of the parties on equitable principles. While here there is no bankrupt or insolvent law to which recourse can be had. But even in England similar equitable principles have been applied in the converse case of the seizure of the property of the firm upon an execution against an individual partner. The original manner of executing such a writ was that the sheriff seized the partnership property and sold the aliquot share of the debtor, if two partners, one-half, if three, one-third, if four, one-fourth: *Heydon v. Heydon*, 1 Salk. 392; and it is still the rule in some of the United States as in Georgia: *Ex p. Stebbins & Mason*, R. M. Charlton 77, and in Vermont where partnership creditors have no priority over a creditor of one partner, even as to the partnership effects: *Reed v. Shepardson*, 2 Vermont 120. But that mode of procedure by enforcing a legal right regardless of equity produced injustice; and we find the Courts of Common Law themselves interfering to correct it in the exercise of their equitable jurisdiction, and deciding that the creditor could only take the interest of the debtor partner in the partnership effects; and that interest was only the share remaining due after the partnership debts were settled, and the accounts adjusted. The King's Bench undertook to carry this into effect between the parties, by ordering a partnership account of the partnership effects to be taken by a reference to the Master: *Fox v. Hanbury*

Cowp. 445; *Eddie v. Davidson*, Doug. 650; *Chapman v. Koops*, 3 Bos. & P. 289. Lord Eldon afterwards determined that a Court of Law was incompetent to take partnership accounts, and that it belonged to a Court of Equity to take the account and ascertain what the sheriff ought to have sold: *Waters v. Taylor*, 2 Ves. & B. 299, 301; *Re Wait*, 1 Jac. & W. 605; *Taylor v. Fields*, 4 Ves. 396.

The general practice in the United States seems to be in such a case that the sheriff seizes not merely the moiety but the *corpus* of the joint estate, or so much of the partnership effects as might be necessary to satisfy the execution and sells the interest of the debtor and delivers the property sold to the purchaser. The purchaser thereby becomes tenant in common with the other partner, and if he buy with notice of the partnership, he takes subject to an account between the partners, and to the equitable claims of the partnership creditors: *Phillips v. Cook*, 24 Wend. 389.

If the Courts have assumed a power to modify the legal lien in this case, there seems no greater difficulty, if the circumstances call for it, in modifying the lien in the case before us. Under the Judicature Act the sheriff could be protected by an order in the nature of an interpleader. In the case of an execution against one member of the firm only, the proceedings would naturally be taken by the solvent members: *Churchill on Sheriffs*, 2nd ed., 218; but where the dispute is between competing creditors there does not seem to be any duty cast upon them of taking the initiative more than in ordinary cases of interpleader: *R. S. O. c. 54, s. 10*, and to treat the claimant as having abandoned his claim by not instituting proceedings before payment over of the money, though he had before that notified the sheriff of his claim, seems wholly unwarranted.

There is no doubt that a debt owing by a partnership is a joint debt, and an action lies against the survivors in case of the death of a partner, as in *Richards v. Heather*, 1 B. & Ald. 29, but that has very little bearing on the present question, and to say that therefore the creditor is

entitled to benefit of his diligence is to assume the point now in question.

It is said that insolvency is not bankruptcy, and therefore that insolvency can give no right to the relief now claimed. The case of *Ex p. Janson*, 3 Mad. 231, Buck, 227, does not appear to establish any thing of the kind, and I apprehend that Mr. Sugden's remarks in *Ex p. Moult*, Mon. & Bl. 35, refer to the same question as *Ex p. Janson*. It is a rule in bankruptcy that a joint creditor shall not prove and receive a dividend under a separate commission, though there is not any joint fund, if there be a solvent partner. And by a *solvent partner* in that case is understood a partner against whom no commission of bankruptcy has issued; for a person may be insolvent, and yet be able to pay a considerable part of his debts; and as a creditor might obtain payment, it follows that insolvency must, *for this purpose*, be distinguishable from bankruptcy; for, in the latter, the whole of the property is absorbed by the commission. It is obvious that the interpretation given to the term *solvent partner* is peculiar to the particular case, *for this purpose*, and does not apply to the question of adjusting the equities in regard to the estate against which a commission had issued.

The rule in *Story's Eq. Jur. s. 675*, is, that "the separate creditors of each partner are entitled to be first paid out of the separate effects of their debtor before the partnership creditors can claim anything; which can be accomplished only by the aid of a Court of Equity; for at law a joint creditor may proceed directly against the separate estate." And this is said by Mr. Justice Story to be "another illustration of the doctrine of marshalling assets, and proceeds upon analogous principles; and it is commonly applied in cases of insolvency, or bankruptcy." *Doggett v. Dill*, 30 Alb. L. J. 274, 108 Ill.

It was argued that this doctrine only applies to administration in equity or bankruptcy to secure equality of apportionment; and that this is not a case of the kind, as the

plaintiffs only gave notice, and did nothing more, and must be taken to have abandoned their claim. I have already expressed my opinion that the notice of abandonment in such circumstances is quite unwarranted. And it was further argued that marshalling does not apply, because, when assets are marshalled equity follows the law in giving the same priority to creditors which is enjoyed at law : *Story*, s. 553. And that was no doubt the rule in the ordinary case of several creditors of the same debtor where no question arose as to the incidence of the debts on different estates. But it does not, or may not, apply to the case now in question. It is the very subject of discussion in the numerous American cases to which the text writers have referred, and whether the priority attained by the levy is not to be avoided as in the converse case of a levy for a separate debt on partnership property.

Notwithstanding some expressions of dissatisfaction with the rule of joint estate for joint creditors, and separate estate for separate creditors, it is too firmly established to be disregarded. Mr. Justice Story, in his work on Partnership, s. 365, does not think it so purely artificial as it has sometimes been suggested to be, and shews its existence in the civil, and in the French law : *Dig. Lib. 14, tit. 4, l. 5, s. 15* ; 2 *Emerigon Contrat à la Grosse*, ch. 12, s. 6 ; *Inst. 4, 7, 3* ; *Duranton, Cours de Droit Franc*, Tom. 17, s. 457 ; *Dig. 42, 6, 3, 2*.

The rule is not confined to cases of bankruptcy, and the administration of assets on the decease of a partner. There are various ways in which the question may be raised in equity. One instance appears in our own Court : *McDonald v. McCallum*, 11 Gr. 469. In that case, before the passing of the insolvent law, two partners assigned their joint and separate estates together for the benefit of their joint and separate creditors *pari passu*. An assignee afterwards, under the Insolvent Act, filed a bill to set aside the previous assignments on the ground that to put the separate creditors of each on an equality with the joint

creditors in respect of the joint property and of the separate property of the other partner, was a fraud on the joint creditors. It was established by evidence, however, that the joint estate alone was insolvent, and that the separate property of each was more than sufficient to pay his separate debts. This of course could be no injury, but must have been a benefit to the joint creditors, and therefore no fraud upon them, and the bill was dismissed. Had the fact been otherwise no doubt the plaintiff would have obtained relief.

Jarvis v. Brooks, 3 Fost. 136 (N. H.) establishes that "where the land of one partner is set off, in execution, for a debt due from a partnership, and afterwards the same land is set off, in execution for a separate debt of the partner, the separate creditor of the individual partner will hold the land." And the case does not stand alone. The principle upon which it proceeded is in accordance with the law laid down in *Murrill v. Neil*, 8 How, 414, in the Supreme Court of the United States; and there are many other cases in the American Courts affirming the same principle, and supported by a wealth of cogent and logical reasoning. Chancellor Kent in his commentaries vol. 3, p. 65 (12th ed.), cites a number of authorities in support of the same principle, viz: "That if the partnership creditors cannot obtain payment out of the partnership estate, they cannot in equity resort to the private and separate estate, until private and separate creditors are satisfied; nor have the creditors of the individual partners any claim upon the partnership property, until all the partnership creditors are satisfied." And his editor, O. W. Holmes, cites many more to the same effect. If the weight of authority is to be ascertained by counting cases the preponderance would seem to be in favour of the view I acted upon at the hearing. But it is of little use *weighing* the authorities unless we know the quality of the material to be weighed. In one scale may be gold, outweighed by baser metal in the other. And we know little in this Province of the learning and ability of the Judges in the United States, except as

we can deduce them from the value of the reasons assigned for their judgments. Mere authority then, ascertained by the number of American decisions, by which we are not bound, must count but little with us. And unless supported by *reason* we need pay little attention to them; though we may be bound by authority *without reason* in decisions in our own Courts. In dealing with the almost innumerable cases to be found in the reports of the different States of the Union, we must, to a large extent, rest on their text writers, many of whom are of great merit; and we can find few more reliable than Chancellor Kent, his editor O. W. Holmes, Judge Story, and Messrs. Hare and Wallace, the editors of White & Tudor's Leading Cases.

Chancellor Kent and Mr. Holmes cite in support of the proposition, quoted above, a number of cases to which counsel referred, and treat some of the others they mentioned as variations from the general rule, such as *Camp v. Grant*, 21 Conn. 41. And *Meech v. Allen*, 17 N. Y. 300, is referred to along with *Strauss v. Kerngood*, 21 Gratt. 584, and *Miles v. Pennock*, 50 N. H. 564, as shewing that "Equity Courts have refused to supersede the legal lien of a prior judgment recovered by a partnership creditor, upon the separate estate of one of the firm *in some cases*." Several of the cases referred to by counsel are based upon the distinction between proceedings at law and in equity, and others upon the principle that *æquitas sequitur legem*, as I pointed out in my former judgment.

Messrs. Hare & Wallace, in their note 2 W. & T. L. C., p. 416, say: "Such are the principles as modified by equity which regulate the distribution of the joint and several effects of the members of a firm. The partnership creditors have a paramount right to the joint assets, and the separate creditors no priority as it regards the private property of the partners, except that which they may acquire through greater diligence."

This is contrary to the English rule, and contrary to the rule laid down by Chancellor Kent. Messrs. Hare & Wallace then proceed to state the English rule, and afterwards state

the arguments against it, and then say : "The former view (the English one) is now adopted by the Supreme Court of the United States, and by a majority of the State tribunals."

They cite a great number of cases, and amongst others, *Payne v. Matthews*, 6 Paige 19, and *Hall v. Hall*, 2 McCord Chy. 269, 302. And one result is said to be (p. 420), that "a general assignment by a partner will take effect in the first instance for the benefit of his separate creditors: *Murrill v. Neil*, 8 How. 414; *Rodgers v. Meranda*, 8 Ohio N. S. 179; *Pennington v. Bell*, 4 Sneed 200; and if a clause preferring the joint debts cannot be stricken out, it will invalidate the deed: *Jackson v. Cornell*, 1 Sandford. Ch. 348." An assignment by one partner of his separate estate for partnership debt will confer a lien as effectual as any that can be obtained by an execution; but these and many others of the American cases determine that this lien must give way to the equity of the several creditor. And the assignment in such a case is only placing the separate property in the same position as if seized on execution by a joint creditor. See also *Doggett v. Dill*, 30 Alb. L. J. 274 108 Ill.

Several of the cases in New York no doubt give a preference to a lien by execution and thus give a creditor the benefit of his diligence, but they are professedly based upon the ground that the remedy of the debtor is in equity, or that equity follows the law. I have little to add to what I said at the hearing upon these points. We have no Court of Common Law. Our Courts are Courts of Equity. And though it may be proper enough to give a creditor the benefit of his diligence, where the contest is between several creditors of the same debtor, with no equity arising from the nature of the property taken in execution, or from the nature of the rights involved, but no such preference should be given where it works the injustice of depriving the separate creditor of the benefit of the property of his debtor.

I am not disposed at present to differ from the Chancellor when he says that the reversal of the rule that equity follows the law applies only to cases where there is a vari-

ance between law and equity with reference to the same matter, that there must be the one subject matter in respect of which there is a conflict. But I think there is a divergence here between legal and equitable rules. Equity would assign the separate estate to the separate creditor. Law would give it to the joint creditor. It is the one subject matter, and the rule was different in the different jurisdictions. The reasoning of the American Judges, who rest their decisions upon this maxim, is a proof that law and equity differ upon the subject, and with the reversal of the maxim the decisions became authorities in favour of the view I am now presenting. And though in some of the cases it is said that liens by execution are preserved I think they must give way to the *reason and authority* of the others to which I have referred.

As the plaintiffs had an execution in the sheriff's hands before the sale, I refer to the following cases as shewing that an advertisement and sale under any writ accrues to the benefit of all, and also as shewing the difficult nature of the questions sometimes imposed upon the sheriff: *Rowe v. Jarvis*, 13 C. P. 495; *Bank of Montreal v. Munro*, 23 U. C. R. 414.

The following cases in our Courts shew the mode of selling a partner's interest in the partnership on an execution against the individual partner: *Taylor v. Jarvis*, 14 U. C. R. 128; *Flintoff v. Dickson*, 10 U. C. R. 428; *Wilson v. Vogt*, 24 U. C. R. 635; *Clark v. Corbett*, 27 U. C. R. 161.

Formerly, in the distribution of the assets of a deceased debtor, there was a distinction between what were termed legal assets and equitable assets. Equitable assets were such as could not be realized without the aid of a Court of Equity. In distributing legal assets equity followed the law, and respected legal priorities. But where the assets were the fruit of equitable principles, equity preserved its great principle of equality in their distribution; and the legal right of priority, whether arising from an execution, or from some positive rule of law, was made to bend to the equitable principle. As stated in *Morrice v.*

The Bank of England, Forrester's Cases, Temp. Talbot 218, the rule of a Court of Equity, with regard to equitable assets, was to put all the creditors on an equal footing; so, where the assets were partly legal and partly equitable. And though equity could not take away the legal preference on legal assets, yet if one creditor had been partly paid out of such legal assets, when satisfaction came to be made out of the equitable assets, the Court would defer him until there was an equality in satisfaction of all the other creditors out of the equitable assets, proportionable to so much as the legal creditor had been satisfied out of the legal assets. In *Thompson v. Brown*, 4 John. Chy. 619, Chancellor Kent extended this rule so as to make it apply to a fund which originated in a decree in Chancery, even where the intervention of Chancery was not necessary, and this rule was adopted in the Revised Statutes of New York: see *Wilder v. Keeler*, 3 Paige 167. By the Statute of Canada, 29 Vic. c. 28, s. 28, debts by specialty and by simple contract were placed on the same footing in the administration of the assets of a deceased person, but so as not to prejudice any lien existing during the lifetime of the debtor on any of his real or personal estate: *R. S. O. c. 107, s. 30*. In *Baker v. Daubarn*, 19 Gr. 113, 117, it was assumed that this statute did not affect the question arising between the creditors of a partnership and of an individual partner, in regard to the separate property of that partner. But the statute did not give any lien, it merely left it as it was, and it would be governed by the rules in *Morrice v. The Bank of England*, *supra*.

By the effect of the Judicature Act, however, all distinction between legal and equitable debts, and legal and equitable remedies, is abolished. Debts of every kind are now recoverable in one *forum*, and the same *forum* enables creditors to reach every kind of assets, whether formerly legal or equitable, and the necessary result is that the distinction between legal and equitable assets is at an end, and upon this subject the rules of law and equity being

at variance the latter are to prevail. All are equitable and distributable on principles of equality, and there is no need to resort to the circuitous mode of reaching equality pointed out in *Morrice v. The Bank of England*, but the end may be attained directly.

FERGUSON, J.—The facts of the case seem to be mainly as follows. Thomas William Robinson and James Elliott were in partnership and incurred liabilities as partners and also as individuals. They became unable to pay their debts in both capacities, and judgments against them were obtained by creditors.

The first execution placed in the hands of the sheriff to be executed was one at the suit of Lightbound & Co. upon a judgment recovered against "T. W. Robinson & Co.," this being the name of the firm, and the sheriff was by this writ commanded to levy the amount out of the goods and chattels of T. W. Robinson. The second was at the suit of the Bank of Montreal against James Elliott and Thomas W. Robinson, and the sheriff was by this writ commanded to levy the debt out of their goods and chattels. No question arises in respect of this writ, and the next in point of time is the plaintiffs'.

The debt for which the plaintiffs obtained their judgment was the separate debt of Robinson.

The sheriff seized the furniture of Robinson, his separate property, and sold it to Lightbound & Co. It was of more value than the amount now claimed by the plaintiffs. Lightbound & Co. gave credit for the amount arising upon the sale of this purchase upon their execution. The sheriff returned the plaintiff's writ *nulla bona* as to the residue beyond the sum realized for the plaintiffs out of the partnership assets.

The complaint of the plaintiffs is, that the sheriff instead of selling the goods of Robinson upon the execution of Lightbound & Co., and applying the money upon that execution, which was one issued upon a judgment against the firm of T. W. Robinson & Co., should have applied the

money upon the plaintiffs' execution, which though later in point of time of delivery to the sheriff was issued upon a judgment against Robinson alone for a debt contracted on his own behalf; and the question is whether this subsequent execution of the plaintiffs against Robinson for his separate debt had priority, as to Robinson's separate property, over the execution of Lightbound & Co., which was on a judgment against the firm and for a partnership debt; it being found as facts that the sheriff knew who composed the firm of T. W. Robinson & Co.: that he had notice from Lightbound & Co.'s execution that it was for a partnership debt: that he knew before the sale that the plaintiffs claimed the proceeds of the sale of the furniture as applicable to their execution; and that he was told the reason why they so claimed it, namely, that their judgment and execution were for a separate liability of Robinson, and that as to his separate goods it had, as the plaintiffs contended, priority over an execution issued upon a judgment against the firm for the debt of the partnership.

In *Lindley on Partnership*, 3rd ed., 541, it is stated: "If a judgment has been obtained against several persons sued jointly, the writ of execution founded on the judgment must be against all of them, and not against some or one of them only; for the judgment does not warrant such a writ. But, although the writ of execution on a joint judgment must be joint in form, it may be *levied* upon all, or any one or more of the persons named in it; for each is liable to the judgment creditor for the whole, and not for a proportionate part of the sum for which the judgment is obtained. The consequence of this is that the sheriff may execute a writ issued against several partners jointly, either on their joint property, or on the separate property of any one or more of them, or both on their joint and on their respective separate properties; and so long as there is, within the sheriff's bailiwick, any property of the partners, or any of them, a return of *nulla bona* is improper. Of course, if the judgment creditor has had execution and satisfaction against one of the partners, he cannot afterwards go against the

others; but the important point to observe is, that the sheriff is not bound to levy on the goods of the firm before having recourse to the separate properties of its members, and that they cannot require the sheriff to execute the writ in one way rather than another."

This is a very plain statement, and is as I always understood the law to be.

Marginal Rule 346 of the Judicature Act provides that "Where a judgment is against partners in the name of the firm, execution may issue (a) against any property of the partners as such; (b) against any person who has admitted on the pleadings that he is, or has been adjudged to be a partner; (c) against any person who has been served, as a partner, with the writ of summons, and has failed to appear," and there is a further provision whereby a party who has obtained a judgment and claims to be entitled to issue execution against any other person as a member of the firm may apply for leave to do so.

The execution of Lightbound & Co. on its face professes to have been, as no doubt it was, obtained and issued upon a judgment in a suit wherein Lightbound, Ralston & Co. were plaintiffs, and T. W. Robinson & Co. were defendants, and by it the sheriff was commanded to levy of the goods and chattels of T. W. Robinson.

This execution of Lightbound & Co., then, was one in a suit in which the judgment was against partners in the name of the firm; and the execution was issued against one of the partners as such, within the meaning, as I think, of this marginal rule, and the sheriff was plainly told this, on the face of the writ containing the command of the Court to him, to cause the money to be made out of the goods and chattels of T. W. Robinson. And whether the matter is looked at under the light of the law before the passing of the Judicature Act (for that purpose assuming the writ to have been in the form then required), or under the provisions of the Act, I cannot perceive any good reason why the execution of Lightbound & Co. did not constitute a lien or charge upon the goods and chattels of T.

W. Robinson in the bailiwick of the sheriff, in priority of any claim by reason of any execution against the goods of the same T. W. Robinson, subsequently placed in the hands of the sheriff to be executed, even though at the suit of a creditor of Robinson himself, and for a claim entirely apart from the affairs of the partnership. I think the lien of Lightbound & Co. as prior execution creditors was precisely the same in respect of priority, and of any duty or obligation of the sheriff as if it had been obtained by them as creditors of T. W. Robinson for a claim having no connection with the partnership. I think it was the sheriff's duty to execute the writ placed in his hands by Lightbound & Co., according to the command contained in it, observing its priority over the writ subsequently placed in his hands by the plaintiffs. This appears to be what the sheriff did, and is what is complained of by the plaintiffs. I think the sheriff would have been liable to Lightbound & Co., if he had done otherwise, and I am of the opinion that this action cannot be sustained.

I think the equitable doctrines so ably discussed by the learned Judge before whom the cause was tried, have not any application to a case in which a lien such as I think Lightbound & Co. had, has been acquired by placing a prior execution in the hands of the sheriff to be executed.

G. A. B.

[CHANCERY DIVISION.]

HAMMILL ET AL. V. HAMMILL ET AL.

Will—Construction—“Effects.”

A testatrix by her will, after giving to her two sons a certain mortgage, and after sundry other specific bequests, continued: “I further direct that the balance of personal property, consisting of notes and other securities for money, be given to my two sons aforesaid * * * also, that if there be any effects possessed by me at the time of my decease, that the same may be divided equally in value among my grandchildren, share and share alike.”

The testatrix had no real estate at the date of the will, but she afterwards in her lifetime collected the money due on the mortgage, and invested it and other funds in the purchase of land of which she died seized.

Held, that the grandchildren were entitled to the said lands, as well as to the personal estate, of which the testatrix died seized and possessed, not specifically disposed of by the will, for the word “effects” was wide enough to carry the real estate.

THIS was an action for the construction of the will of one Sarah Pettit McElroy, deceased, the provisions of which, as well as the other circumstances of the case, are stated in the judgment.

The action was tried at Hamilton, on April 16th, 1884, before Proudfoot, J.

Moss, Q. C., and *Carscallen*, for the plaintiffs. The word “effects” only passes the personal estate. See *Jones v. Robinson*, 3 C. P. D. 344; *Cansfield v. Gilbert*, 3 East 516; *Doe d. Haw v. Earles*, 15 M. & W. 450; *Doe v. Dring*, 2 M. & S. 448; *Smyth v. Smyth*, 8 Ch. D. 561.

Bruce, for the defendants. The word “personal” does not over-ride the last gift. See *Milsome v. Long*, 3 Jur N. S. 1073; *Jarm. on Wills*, 5th Am. ed., Vol. 2, p. 328.

May 14th, 1884. PROUDFOOT, J.—Sarah Pettit McElroy by her will, made on August 22nd, 1879, gave to her two sons, Thomas Hammill and Samuel Hammill, a mortgage made by Isabella and Thomas Hammill, to be equally divided between them, share and share alike. She also

gave back to these two sons all that portion of their interest in the estate of their grandfather, the late Thomas Hammill, and by them sold and conveyed to her, that is to say, she gave back to each that portion of the interest they respectively sold to her. She also gave to her grandson John Thornton Hammill her gold watch. And then proceeded as follows: "And I further direct that the balance of personal property, consisting of notes and other securities for money, be given to the children of my two sons aforesaid, that is to say, one half of that amount to be given to the children of my son Thomas Hammill, and the remaining half to the children of my son Samuel Hammill aforesaid; also, that if there be any other effects possessed by me at the time of my decease that the same be divided equally in value among my grandchildren, share and share alike."

The testatrix collected the money due on the mortgage in her lifetime, November, 1882, and invested it and other funds in the purchase of certain lands, which were conveyed to her by deed dated the 31st day of May, 1880. She had no real estate at the date of the will.

The testatrix died on the 31st day of August, 1883.

The plaintiffs are the two sons of the testatrix, and her heirs-at-law, one of them being also her administrator with the will annexed.

The defendants are the children of the plaintiffs, and the grandchildren of the testatrix.

The question is, whether the plaintiffs are entitled to the lands as heirs-at-law of the testatrix, or the grandchildren as her *devisees*.

Besides the *notes and securities for money* mentioned in the will, she had \$800 worth of furniture when she died.

I think the testatrix did not mean to die intestate as to any part of her property. The clause directing the disposition of her personal property consisting of notes and other securities for money appears to me to be distinct from that as to her other effects. Each is complete in itself, in one the grandchildren take *per stirpes*, in the other

per capita; and therefore that the word *personal* is not to be read as necessarily connected with *effects*.

It has to be determined therefore whether this word *effects* is wide enough to carry the real estate.

There are many cases on this subject, beginning with *Hogan v. Jackson*, 1 Cowp. 299 where the word *effects* was held to be equivalent to *worldly substance*. Most of them are collected and examined in *Smyth v. Smyth*, L. R. 8 Ch. D. 561, where Malins, V. C., held that a gift of "my sheep and all the rest, residue, moneys, chattels, and all other my effects, to be equally divided among my brothers" carried all the freehold as well as personal estate of the testator. He speaks of the earlier cases cited to me, *Camfield v. Gilbert*, 3 East 516; *Doe v. Dring*, 2 M. & S. 448, as having been decided at a time when there was an extraordinary leaning in favour of the heir-at-law, and that the doctrines of the Court were now more liberal, and cites *Milsome v. Long*, 3 Jur. N. S. 1073, where Lord Hatherley, then Vice-Chancellor, held that the words "stock-in-trade, money, book debts and effects," carried the reversion in real estate: and *Titchfield v. Horncastle*, 7 L. J., Ch. 279, where Lord Langdale expressed his opinion that the word *effects* may be as applicable to real estate as to personalty. He also refers to *Jarman on Wills*, 3rd Ed. p. 693, 4th Ed. p. 728, who says in reference to the later cases: "The last five cases are certainly important authorities, and, with others since decided, they demonstrate the inclination of the Courts at the present day to hold lands to pass under words capable *per se* of comprehending them, notwithstanding their association with terms applicable to personalty only. To reconcile all the cases would require the adoption of some very subtle and unsubstantial distinctions, but the preceding review will convince the reader of the necessity of withholding implicit reliance from some of the early decisions in which the restricted construction prevailed."

A later case of *Jones v. Robinson*, 3 C. P. D. 344, was referred to on behalf of the plaintiff, but the

bequest there was in different terms, viz.: "All other my personal estate, property, chattels, and effects whatsoever and wheresoever, to which I am now seized, possessed, or entitled to, or may hereafter acquire," and the Court considered that the word *personal* controlled the subsequent general words. In the present case I do not think the word *personal* controls *effects* in a distinct sentence, so that *Jones v. Robinson* does not apply.

"To be divided equally in value" is as applicable to real as to personal property, and is in fact done in every case of a partition of lands.

There will be a declaration therefore that the grandchildren are entitled to the lands and personal estate of which the testatrix died seized and possessed, not specifically bequeathed.

Costs out of the estate.

See also *Wilce v. Wilce*, 7 Bing. 664.

This case has been argued before the Divisional Court and stands for judgment.

A. H. F. L.

[CHANCERY DIVISION.]

RE MURRAY CANAL—LAWSON V. POWERS.

Marriage with deceased wife's sister—Uncanonical marriage—Tenancy by the curtesy—Will by infant married woman—45 Vic. c. 42, D.—C. S. U. C. c. 73, s. 16—R. S. O. c. 106, s. 6.

In 1869 L. married G., his deceased wife's sister. G. having had a son by L., died in 1871, seized of certain lands of which L. remained in continuous possession until 1883, the time of action brought.

Held, that L.'s occupation was to be attributed to his rightful character, which was that of tenant by the curtesy, so as not to work tortiously against the heirs-at-law of the wife.

By English law as adopted in this Province in 1792, marriage with a deceased wife's sister was not *ipso facto* void, but was esteemed valid for all civil purposes, unless annulled during the lifetime of the parties. Such remained the law here until 45 Vic. c. 42, D., which removed all disabilities.

It is not necessary to entitle to tenancy by the curtesy that the marriage should have been canonical.

In a so-called will, executed a few days before her death, G. assumed to devise the land in question to L. At the date of this will G. was only eighteen years of age.

Held, that the will was invalid.

C. S. U. C. c. 73, s. 16 (R. S. O. c. 106, s. 6) only removes the disability of coverture in respect to wills, not of infancy.

THIS was an appeal from the report of the Master of this Court at Cobourg, pursuant to an order of Proudfoot, J., made on 26th June, 1883, whereby it was referred to the said Master to enquire and report who were the parties entitled to certain compensation money paid into Court by the Minister of Railways and Canals, in respect of certain lands taken possession of by him, for the purpose of a certain public work known as the Murray Canal, under power vested in him by 31 Vic. ch. 12, D., 37 Vic. ch. 13, D., and 42 Vic. ch. 7, D.

It appeared before the Master that one Samuel Powers was undisputed owner of the lands in question in fee simple up to his death in 1866. He died intestate, leaving him surviving his widow and three daughters, Eliza Ann, Gertrude, and Laura. In 1867, Eliza Ann married one P. H. Lawson, and died intestate and without issue, in 1868. In 1869, Laura also died intestate, and without issue, and

in the same year the widow of Samuel Powers died. In 1869, also, Gertrude married P. H. Lawson, and died in 1872, having had by him one son, who predeceased her.

At the time of her marriage with P. H. Lawson, Gertrude and her mother were in possession of the premises, and Lawson and Gertrude continued in possession up to the death of the latter in 1872, since which time, up to the present proceedings, which were instituted in 1883, Lawson had continued in free and uninterrupted possession.

Very shortly before her death, when eighteen years of age (having been born in 1853) Gertrude executed a so-called will whereby she purported to devise the property in question to Lawson. On February 26th, 1884, the Master reported that of the compensation money paid in, P. H. Lawson was entitled to $\frac{3}{4}$ as his own absolutely, having acquired good title by possession as to this; and that he was entitled during his life to the issues and profits of the residue; and that to the said residue certain of the heirs-at-law of Gertrude were entitled in reversion, they not having been, at the time of action brought, barred by Lawson's possession, the ground for his decision being that Lawson's marriage with his deceased wife's sister was uncanonical.

Several other of the heirs-at-law of Gertrude now appealed from this decision, on the ground that the Master ought to have determined and reported that Lawson was only entitled to the issues and profits of the fund in Court during his life, and that the appellants were entitled to the said $\frac{1}{4}$ of the compensation absolutely after his death.

The matter came up before Boyd, C., in Chambers, on March 24th, 1884, when it was enlarged into Court, and again came before Boyd, C., on the following day.

Moss, Q. C., for the appellants. The Master's decision was based on 45 Vic. ch. 42, D., he holding that at the time this came into force certain of the parties had not been barred by the statute. The whole question is, has P. Lawson any right to call in question the validity of the marriage? The

Master held the marriage was uncanonical, and that therefore the husband was not in as tenant by the curtesy. We say there was no means by which he could annul this marriage after the death, at all events, of one of the parties to it.

Now, *Hodgins v. McNeil*, 9 Gr. 305, clearly shews the marriage could only be annulled by proper proceedings taken in the lifetime of the parties by one of them. Can Lawson now be heard to disaffirm his marriage? I say no. Then the Act 45 Vic. c. 42, D., is perfectly clear. Sec. 1 prevents Lawson from saying there ever was such a law as made this marriage of his invalid. It was evidently intended by the Act to take away vested rights if any existed. *McEvoy v. Clune*, 21 Gr. 515, and cases of that class, shew the intention of the Legislature must prevail.

W. R. Riddell contra. The object of the statute was only to affect the personal status, not the civil rights? It was not to divest a statutory fee simple. If it was, then the Act was *ultra vires* of the Dominion, being a dealing with civil rights. I refer also to *Steph. Blacks.*, 7th ed., vol. i., p. 263, as to tenancy by curtesy. This shews to create a tenancy by curtesy the marriage must be both canonical and legal. This marriage was illegal: *Brooke v. Brooke*, 9 H. L. Cas. 193. And even if the Act might make the marriage legal, it could not make it canonical. It was clearly uncanonical: *Hill v. Good*, Vaugh. 302; *Harrison v. Burwell*, Vaugh. 306; *S. C.*, 2 Vent. 9. Even *Hodgins v. McNeil* shews these marriages are illegal. Tenancy by the curtesy rests on a different relation to that on which tenancy by dower rests; the former arises from a relation to a deceased child. See also *Furnier v. Mitchell*, 3 A. R. 510.

Now, a tenancy by curtesy could only be initiate where there was issue of a legal marriage, but here at the time of the initiation all admit the marriage was illegal.

[BOYD, C.—If the child had survived would this Act have rehabilitated the child?]

No. It would have made the child a legal child, but by that time Lawson could have had a good title by the statute. I say Lawson has a fee simple in all the property, and the Master has erred in saying he is tenant by the curtesy at all. I contend he has a fee as against all children of age five years before the institution of these proceedings, which includes all. Then I say under the will he is entitled. C. S. U. C. ch. 73, sec. 16, was the Act in force at the time of the will. If it be said the common law must be looked to in construing this Act, I refer to *Mitchell v. Weir*, 19 Gr. 568.

Moss, Q. C., in reply. The other side have not appealed from the report as regards the 1st. As to the question of *ultra vires*, having the right to alter personal status, there was also the right to alter the rights flowing from such status. Clearly Parliament intended to do so. But there is no getting over sec. 1. It sweeps away the old law altogether. Therefore it must be held that the parties from the beginning held a perfectly legal position. As to the argument about the marriage being canonical, there have been changes as to this since Blackstone. Moreover, in England tenancy by the curtesy is recognized without going into such questions. All the other conditions of a tenancy by the curtesy exist here beyond dispute. As to the will.

[BOYD, C.—Is there any evidence to shew he claimed under the will ?]

He says so himself, and he registered the will. The will is so expressed that he cannot now be heard to say that he did not hold the relationship of husband towards her. *Hodgins v. McNeil* is a pretty clear authority in our favour. As to the question of a woman being able to make a will, C. S. U. C. ch. 73 was only intended to give a married woman the right to deal with her own estate during marriage in the same way as a *feme sole* and unmarried; but a sole or unmarried infant at that time could not devise his estate: 34-35 Hen. VIII. ch. 5, is clear. *Leith* on Real Property, Stat. p. 283, takes a different view of the Act.

[BOYD, C.—In other words the disability of Stat. of Hen. VIII. was not repealed.]

Yes.

April 2nd, 1884—BOYD, C.—The marriage of a man with his deceased wife's sister was not *ipso facto* void by the English law which was adopted in 1792 as the law of this country by the Act 32 Geo. III., ch. 1. It was illegal in the sense of being a violation of the canonical rules by which such a union was regarded as within the prohibited levitical degrees. Such a marriage was esteemed valid for all civil purposes unless a sentence of nullity was obtained from the Ecclesiastical Courts during the lifetime of the parties. Such is the express language of Sir John Nicholl in *Elliott v. Gurr*, 2 Phill. 19, a case decided in 1812. The same matter was much discussed in 1859, and placed in a very clear light in the addresses of the Lords reported in *Fenton v. Livingston*, 3 Macq. 497. Lord Cranworth, in commenting upon the statute of Henry VIII. (a), said: "It is true that by the construction put upon that statute no inquiry as to the validity of the marriage could be instituted by the Ecclesiastical Court after the marriage itself had come to an end by the death of one of the parties; so that inasmuch as the temporal courts had no jurisdiction, the issue would succeed to the estate of a deceased parent as his or her heir, if no proceedings had been taken in the lifetime of both parents to declare the marriage void." (p. 540.)

To the same effect Lord Wensleydale puts it thus, at p. 553: After the death of either party "the marriage would be good in one sense because it could not be set aside, and the issue would be legitimate in that sense, because there was no means provided by the English law to deprive them of the rights belonging to legitimate issue."

And Lord Chelmsford agrees in that view of the law, and says in effect, at p. 556: Such a marriage after the death of either parent becomes irrevocable. Therefore the

(a) 25 Hen. VIII., c. 22 sec. 4.

legitimacy of the offspring is established, because it could not be impeached. See also *Bury's Case*, 5 Co. 98 b. That state of the law was not affected here by subsequent legislation in England, as is pointed out in *Hodgins v. McNeil*, 9 Gr. 305, and such remained the law here till the Dominion Act 45 Vic. ch. 42, was passed in 1882. By the first section all laws prohibiting marriage between a man and the sister of his deceased wife are repealed both as to past and future marriages, and as regards past marriages as if such laws had never existed."

In *Coke on Litt.* 30a. sec. 35, it is laid down that "four things doe belong to an estate of tenancy by the curtesie, viz., marriage, seisin of the wife, issue, and death of the wife." Blackstone says that the marriage must be canonical and legal, citing no authority, however, for his proposition, (B. ii. p. 127.)

In *Smith on Real and Personal Property*, Blackstone's reading of the law is not adopted, and it is there said that if the marriage be only voidable, and is not annulled during the life of the wife, the husband will be tenant by the curtesy. (5th ed., vol. 1, p. 195.) That statement of the law is taken from 1 *Cruise*, Title 5, c. 1, sec. 5, where it is stated in similar terms precisely covering the present case. That is a correct statement of the law, and I hold that the requisite of canonical marriage is not essential.

There is a case of *Rennington v. Cole*, referred to in 7 *Viner's Abr.*, p. 162, pl. 7, as reported in *Noy*, p. 29, which I have not been able to refer to, owing to that page being missing in the volume in the library. As noted by *Viner*, it is as follows: "A man married his father's sister's daughter, * * * it was adjudged that though that marriage might be said to be within the levitical degrees, yet it is a marriage *de facto*, and only avoidable by divorce, which after the death of the husband cannot be done, because thereby the issue would be bastardized; and if the wife had been inheritrix, &c., the husband should have been tenant by the curtesy. See also *Roper's Husb. & Wife* Vol. i., pp. 5. 338.

It would be a strange result to hold that the wife surviving could have dower, and the children surviving could inherit (as was held in 9 Gr. 305), and yet that the husband surviving was not tenant by the curtesy. When the wife died in the present case the husband was in possession as life tenant by the curtesy, and the Statute of Limitations did not run in his favour. His occupation is to be attributed to his rightful character so as not to work tortiously against the heirs-at-law of his wife.

I say the heirs-at-law of his wife, because I agree with the Master that his wife's attempted disposition of the property by will was inoperative. She was not yet nineteen years of age at the time of her death.

By 34-35 Henry VIII., ch. 5, sec. 14, wills or testaments made of lands by any woman coverte or person within the age of twenty-one years, shall not be taken to be good or effectual in law. Infants were competent to dispose of personalty by will when they had arrived at an age of comparative discretion, fixed in males at 14 and females at 12. That is now altered by R. S. O. ch. 106, sec. 11, but such was the law in this country when the clause was passed in the Married Woman's Act, which is now invoked as validating the will. By C. S. U. C. c. 73, sec. 16: "Every married woman may * * make any devise or bequest of her separate property, real or personal, * * in the same manner as if she were sole and unmarried." These last words are the key to unlock the meaning. By the then existing law there was a double disability in the case of an infant wife: of infancy, and of coverture. The latter is removed by this enactment, but not the former. An adaptation of the argument of Lord Hardwicke, in *Hearle v. Greenbank*, 3 Atk. 714, is pertinent in the construction of this clause: What had the Legislature therefore in view? Why, to exclude the disability of coverture, and this was all they intended to guard against, and if they likewise intended to exclude the disability of infancy they would have taken care equally to express it. See also *Leith's Real Property Stat.*, vol. i. p. 283.

The husband will therefore be declared entitled to no more than the interest of the fund in question during his life, and thereafter it will be distributable among the heirs-at-law. The parties may perhaps agree upon a sum in gross to be paid him, and forthwith distribute all the moneys.

Costs of this appeal must be given to the appellants. I have dealt with the case apart from the effect of the late Statute, 45 Vict. ch. 42, but it seems to me difficult to avoid the conclusion that the result, if that governed, would be the same as I have arrived at independently of the statute.

A. H. F. L.

[CHANCERY DIVISION.]

MORROW V. JENKINS.

Will—Devise of interest—Right to principal.

The will of a testator contained the following clause : " To my daughters Ellenor and Mary Maria, I give, devise, and bequeath the interest of three thousand dollars each per annum, to be paid to each of them half-yearly."

Held, that the devisees took an absolute interest in the \$3,000 given to each of them.

Elton v. Sheppard, 1 Bro. C. C. 532, followed.

THIS was an action, brought by Mary Maria Morrow and Ellenor Blake, against Thomas Woods Jenkins and Rowland Jenkins, the executors of, and other parties who were beneficiaries under the will of William Jenkins, for the construction of a clause in the said will.

The plaintiff's statement of claim set out the whole will, and the clause in dispute was as follows : " To my daughters Ellenor and Mary Maria, I give, devise, and bequeath the interest of three thousand dollars each per annum, to be paid to each of them half-yearly"; that it was doubtful whether the bequests to the plaintiffs of the interest on \$3,000 each in the said will contained were equivalent to bequests of the said sum of \$3,000 absolutely to each of them, or if the plaintiffs were entitled to elect between accepting the said principal sums or the interest thereon.

The defendants all admitted the execution of the will, and set up that both the plaintiffs were married women, and were at the time of the making of the said will, and of the death of the testator, residing with their husbands, and that they had no issue, and were past the age of child-bearing : that all the defendants, the other children of the testator, had issue living at the time of the making of the said will ; and the executors set up in addition that were informed by the person who prepared the will that it was the intention of the testator that the plaintiffs should, in view of the circumstances herebefore stated, only receive the interest

upon the said sums of \$3,000, and should not receive the corpus of the said moneys, and if the language of the said will failed to effectuate the said intention, it arose from the failure to employ appropriate language to express the same; but the said defendants claimed that it clearly appeared from the said will that the testator's intention was that the interest only on the said sums of \$3,000 should go to the plaintiffs, and upon their death the principal should revert to the residuary legatees.

The case was argued on the 17th September, 1884, before Proudfoot, J.

Garrow, for the plaintiffs. The question is, does the bequest of the interest on the \$3,000 give the \$3,000 absolutely to the plaintiffs? The plaintiffs come to the Court for a declaration as to their rights under the will. In the clauses immediately preceding and next after the clause in question the testator shows that he knows how to make a bequest for life. The will, taken as a whole, shows that the plaintiffs are entitled to the \$3,000 each absolutely. The executors would have to provide a legacy of interest or a legacy of \$3,000 in any event. There is no devise to them of the residue, and they were to provide for the legacies and then wind up the estate, which they could not do if they had to pay the interest from year to year. I refer to *Rawlings v. Jennings*, 13 Ves. 39; *Watkins v. Weston*, 32 Beav. 238, affirmed in 3 De G. J. & S. 434; *Boosey v. Gardner*, 18 Beav. 471; *Penny v. Peppin*, 15 W. R. 306; *Clough v. Wynn*, 2 Mad. 188; *Blann v. Bell*, 2 De G. M. & G. 781; *Elton v. Sheppard*, 1 Bro. C. C. 532; *Re Andrew's Will*, 27 Beav. 608; *Crawford v. Lundy*, 23 Gr. 244.

Moss, Q. C., for the defendants. The statement of defence shows sufficient to make it apparent that the plaintiffs were only to get the interest. This is not a case of an *indefinite* bequest of interest, but a *definite* bequest payable in a particular way. The last clause of the will, directing the executors to pay what shall be left, shows

that they were the parties to deal with the estate and make the payments. The clause in question provides that the payments were to be made half-yearly, and that direction could only apply to interest paid from time to time. The rule is laid down in *Rogers v. Lowthian*, 27 Gr. at p. 560, in these words: "It is true that an indefinite bequest of the income of personal estate passes the absolute interest, but I am not aware that a gift of income for a limited period has ever that effect." The context of a will may cut down what might otherwise have been an absolute gift: *Buchanan v. Harrison*, 8 Jur. N. S. 965. 1 *Jarman* on Wills, 4th ed., 797, note y. The executors were to pay half-yearly, and the plaintiffs were not to get the principal, and the reason of that was that the children were to get it afterwards.

October 9, 1884—PROUDFOOT, J.—Action for construction of the will of Wm. Jenkins.

The plaintiffs are two of the daughters of the testator, who are mentioned in the 8th clause of the will, which is as follows:

"Eighth.—To my daughters Ellenor and Mary Maria, I give, devise, and bequeath the interest of \$3,000 each per annum, to be paid to each of them half-yearly."

And the question is, whether the bequest of the interest of the \$3,000 is equivalent to a bequest of the principal absolutely.

The defendants say that at the date of the will, and of the death of testator, the plaintiffs were both married women, their husbands being alive, and that they never had any children, and are now past the age of child-bearing, while all the other children of the testator had issue living at date of will. The defendants further say that they are informed by the person who drew the will, that in view of these circumstances it was the testator's intention that the plaintiffs should only receive the interest upon the sums mentioned during their lives.

I cannot act upon parol evidence of the intention of the

testator for the purpose of controlling or influencing the construction of the will, the language of which must be interpreted according to its proper acceptation, or with as near an approach to that acceptation as the context of the instrument and the state of the circumstances existing at the time of its execution will admit of: 1 *Jurman* on Wills, 3rd ed., 386.

The other bequests in the will give but little aid in ascertaining the intention of the testator in regard to these bequests to the plaintiffs. After devises of several parcels of lands to his sons in fee, he bequeaths to his wife the interest of \$4,000, to be paid to her quarterly, and that she should have a home at the homestead and the use of his household furniture.

He next bequeaths to his daughters Martha, Anna, and Lydia, their heirs, administrators, and assigns, \$3,000, each, to be paid by his executors out of proceeds after mentioned, i. e., the proceeds of lands and personalty which his executors were authorized to dispose of by the 10th clause of the will.

To his daughter Elizabeth, certain real estate for her life and that of her husband, and the interest of \$1,500, to be paid to her quarterly, the \$1,500 to be divided, on her death, among her children, share and share alike, and on the death of her and her husband the real estate given to her for their lives is to be sold and the proceeds divided among her children, share and share alike.

Then comes the devise to the plaintiffs above set out, and which is similar to the bequest of the \$4,000 to the wife.

He then bequeathed to his uncle \$60 a year during his life, to be paid to him half-yearly.

The 10th clause gives authority to his executors to sell real estate not given to his sons, and to collect personal estate, &c. And, lastly, he directs that after settlement of the legacies of whatever money may be left, the executors are to pay to his son Thomas \$500, and distribute the balance among all his children equally.

The bequest to the daughters Martha, Anna, and Lydia, shows that the testator knew how to give an unmistakably absolute interest in money, while the bequests to Elizabeth and to his uncle show that he knew equally well how to give life interests.

The bequests to the wife and the plaintiffs do not contain such a clear expression of intention. They must therefore be left to the ordinary rules of construction.

The general rule is, that where the "interest" or "produce" of a fund is bequeathed to a legatee, or in trust for him, *without any limitation as to continuance*, the principal will be regarded as bequeathed also. 2 *Williams* on Executors, 6th ed., 1109. *Theobald*, 1st ed., 243.

It was contended, however, that the direction to pay the interest to the daughters half-yearly, while the estate was given to the executors, took it out of the operation of this rule, and rendered the gift not an indefinite one.

But *Elton v. Sheppard*, 1 Bro. C. C. 532, disposes of this argument. In that case the testatrix gave by will to trustees £2,000, in trust, to pay the produce to her daughter Mary Elton, wife of Abraham Elton, and mother of the plaintiff, for her own sole and separate use, independent of her husband, and not subject to his debts or control, her receipt alone to be a sufficient discharge for the same; and authorized her daughter to dispose of the £2,000 as she should by any will or writing appoint.

The £2,000 was set apart, and Mary, the daughter, died without having made any appointment. The plaintiff claimed it as part of the personal estate of her mother, either as an absolute gift to her, or as undisposed of in the event which had happened, and therefore resulting for the benefit of the mother, as next of kin of the testatrix. It was held that the first words in trust, *to pay the produce to Mary Elton, for her separate use*, being unaccompanied by words limiting the duration of the trust, gave her the absolute interest, and that the subsequent words giving her the power of appointment, were merely an anxious

expression of the intention of the testatrix, that she should have an uncontrollable power of disposing of the fund.

That was a stronger case than the present, for besides the payment of the produce of the fund, which clearly means the interest or other increment accruing from time to time, there was the power to appoint, which contemplated that the fund would be subject to the appointment of the legatee by will or writing.

Here there is no power to appoint, and the absolute interest, from the gift of the interest, is not affected by any inference of intention from the power to appoint that the fund was to be kept to answer that power. In both cases the payments of the produce or interest was to be made by trustees, and in *Elton v. Sheppard* the payment must have been at the gale days, as clearly as if it had been expressed every six months.

I think the plaintiffs took an absolute interest in the \$3,000 given to each of them.

G. A. B.

[CHANCERY DIVISION.]

GOUGH V. BENCH. (a)

Contract—Improvvidence—Specific performance—Pleading—Costs.

The court must see its way very clearly before it will decree specific performance of a contract, and it must be satisfied as to the integrity and good faith of the parties seeking its special interference. Where incapacity and inadequacy go hand in hand, the Court may refuse to enforce a contract, although the purchaser was guilty of no greater fault than making a hard and unconscientious bargain.

In this case, the plaintiff, an old woman of the age of eighty-six, sued for rescission of a contract for the sale of land, and the defendant by way of cross-relief asked for specific performance. The evidence shewed that at the time of contract there was inequality between the parties in that the plaintiff was not so well able to protect her own interests, as was the defendant to protect his; that she had capriciously and improvidently rejected the advice of her solicitor, who tried to persuade her to accept an offer more advantageous; that she was illiterate, and her capacity (weak at best) was affected by her extreme age, by her distress from want of money, and by drink; that the price offered by the defendant was clearly inadequate; that though it did not appear that the defendant was guilty of fraud, yet that probably the plaintiff did not clearly comprehend the terms of the bargain.

Held, that under these circumstances, though no sufficient reason existed for interfering with the decision of the Judge below, in dismissing the plaintiff's bill, specific performance of the agreement should not have been decreed.

Held, also, that inasmuch as all the evidence that could throw light upon the case, had, admittedly, been given, the fact that the issue of improvvidence was not raised on the pleadings was immaterial. In such a case it is a mere matter of form to adapt the pleadings to the matters proved.

Held, further, as to costs, that, inasmuch as the plaintiff succeeded in the only branch of the case argued before the Divisional Court she should get her costs of that appeal, but as to the rest of the suit, to save the expense and trouble of apportionment, no costs should be given or received.

THIS was a suit brought by Adelia Gough against Michael Bench, for the purpose of having a certain agreement for the sale of land set aside and cancelled as fraudulent and void.

By her bill of complaint the plaintiff alleged that she was the owner of a farm worth at least \$5,000: that she

(a) When this case was first decided it was thought unnecessary to report it, as being chiefly a finding of facts on the evidence. As, however, it has since been referred to on several occasions, a full report is now given.

had given her solicitor instructions to sell it: that she was about eighty years of age, and unable to read written matter, or even to write her name: that she was wholly unaccustomed to business, and by reason of the feebleness occasioned by age, and her want of business experience, was not capable of understanding land transactions: that the defendant called upon her for the purpose of negotiating for the purchase of her said farm: that she refused to enter into an agreement with him without the aid of her solicitor: that thereafter he called again for the same purpose, and that he then, at her request, accompanied her to the office of her solicitor: that there the defendant informed the solicitor that he had purchased the farm for \$3,000, and requested him to prepare the necessary documents to carry out the transaction, and the solicitor told him he could not carry it out, because he had other and larger offers, and had refused them, and they were still available, so that the defendant must make an advance on those offers: that the defendant then left the office without any agreement having been arrived at, and she supposed he had abandoned his intention to purchase: that in informing the solicitor that he had agreed to purchase, he did so without the authority or consent of the plaintiff: and that the defendant then conceived the design of procuring a conveyance of the farm by a fraudulent scheme.

The plaintiff then proceeded to set out the allegations of fraud with which she charged the defendant. She alleged that on her way home from the office of her said solicitor she was met by the defendant, who informed her that his wife was in a certain hotel and wished to see her: that she then accompanied the defendant to the hotel, and shortly after their arrival the latter proposed something to drink: that immediately after drinking, the defendant and his wife endeavoured to persuade her that the offer the defendant had made for the said lot was a good one, that her solicitor was not properly looking after her interests in not advising her to accept it, and that she should accompany them to the office of a certain other solicitor,

and have the proposed agreement carried out, and writings drawn and executed: that she declined to go to the office of any other solicitor, and was about to depart for her home, when the defendant and his wife asked her to go to the office of said other solicitor for the purpose of obtaining the number of the lot, and an abstract of title thereto, and with great reluctance she consented: that before leaving for the office of the said other solicitor, the defendant prevailed upon your complainant to take another glass of strong liquor, and when she arrived at the office, from the effects of the liquor, and her natural feebleness and incapacity for business, she was entirely incapable of comprehending and did not comprehend what was being done: that on their way to the office of the said other solicitor the defendant and his wife said that in order to obtain an abstract of the title to the said lot it was necessary for her to sign a writing consenting thereto, which she believed to be the case: that when at the office of such other solicitor she signed a paper writing by making her mark thereto, which she supposed at the time of writing the same was merely an authority to the defendant to obtain such abstract, but as she had just learned, and as the fact was the said paper writing was an agreement to sell the land, to the defendant for \$3,000. And she charged that the defendant procured the execution of the said agreement by his fraud in inducing her to take the liquor, by his false statements and representations, and by having the said document signed by the plaintiff when deprived of the advice of her solicitor, or of any other friend or adviser; and she prayed that the said agreement might be declared fraudulent and void, and delivered up to be cancelled; that the defendant might be restrained from dealing with the land; costs of suit, and further relief.

The defendant by his defence denied all allegations of fraud, and represented that the plaintiff had repeatedly urged him to buy the farm for \$3,000, as she was in want of money, though he had been reluctant to have any further dealings with her, after hearing from some one in

charge of her solicitor's office that there was a standing offer of \$3,800: that it was at her suggestion that he finally was persuaded to go to the office of the other solicitor and close the agreement, which was drawn up as he and the plaintiff had previously agreed upon, viz., that she should sell and that he should purchase the said land for \$3,000, \$1,000 to be paid on his receiving a good title, and the balance on February 1st, 1882: that it was not until after the agreement was signed that he offered the plaintiff any liquor. And he claimed by way of cross-relief that the agreement might be specifically performed, and that for that purpose all proper directions might be given.

The case was commenced at Orangeville on September 22nd, 1881, before Patterson, J. A., when certain witnesses were examined, and it stood adjourned to Toronto, where the trial was renewed on November 26th, and terminated on November 30th, 1881.

Dalton McCarthy, Q. C., for the plaintiff.

Myers, for the defendant.

On December 1st, 1881, his lordship gave judgment, dismissing the plaintiff's bill, and declaring the defendant entitled to a decree for specific performance of the agreement, with costs of suit.

Afterwards the plaintiff moved by way of appeal to the Divisional Court.

The motion was heard on June 16th, 1882.

W. Cassels and *J. P. MacMillan*, for the appellant, cited *Fullon v. Keenan*, 12 Gr. 388; *Baker v. Monk*, 10 Jur. N. S. 624; *Longmate v. Ledyer*, 2 Giff. 157; *Clarke v. Hawke*, 11 Gr. 527; *Irwin v. Young*, 28 Gr. 511; *Lavin v. Lavin*, 27 Gr. 567; *DeLong v. Mumford*, 25 Gr. 586; *Torrance v. Bolton*, L. R. 8 Ch. 118; *McDonell v. McDonell*, 21 Gr. 342; *Casey v. Hanlon*, 22 Gr. 445; *Fry on Specific*

Performance, 2nd ed., secs. 380, 420; *Pollock on Contracts*, 3rd ed., p. 589; *Falcke v. Gray*, 4 Drew. 651; *Kersten v. Tane*, 22 Gr. 547.

Myers, for the respondent, cited *Griffith v. Spratley*, 1 Cox 383; *Harrison v. Guest*, 6 DeG. M. & G. 424; *Gourlay v. Riddell*, 12 Gr. 518; *Baxter v. The Earl of Portsmouth*, 5 B. & C. 170; *Ex parte Hall*, 7 Ves. 260; *Re McSherry*, 10 Gr. 390.

June 24th, 1884. BOYD, C.—I have carefully read through the voluminous evidence taken in this case, and the impression made upon my mind at the close of the argument has been thereby deepened. While no sufficient reason exists for disturbing the conclusions of fact reached by the learned Judge who tried the action, or for interfering with his decision, dismissing the plaintiff's complaint, yet he went a very long way, and I think too far, in awarding specific performance of the agreement by way of cross-relief to the defendant. There does not appear to have been much argument or attention bestowed upon or directed to this branch of the case, but upon the indisputable facts I cannot avoid holding that the judgment in this regard is not warranted by the usual course of decision in this Court.

The plaintiff employed Mr. McMillan to sell her farm, and he had various offers before the sale in question, none of which came up to the price she asked. She was looking for \$5,000, or \$6,000, but the highest offer made to McMillan was one of \$4,000, by Gillespie, about June, 1881. Besides this, Nathan Clark offered through James Gough \$3,800 cash, which was a standing offer at the time of the sale, and Leighton offered \$3,500. These were unquestionably *bond fide* offers by persons able to pay the price. Mrs. Gough was aware of the offer of \$3,800, and was also told of Leighton's offer before she signed the agreement in question, as Leighton came into Mr. McMillan's office on the 8th of July, and his name was mentioned to Bench, who was there with Mrs. Gough. (Reddick's evidence, p. 198, corroborates this.) Because of her excessive demand the farm was

not sold, and she became in distressed and needy circumstances so that she resolved to get a purchaser herself. She offered the place to Bench for \$4000, but at the first her understanding was that this was to be over and above the mortgage for \$1,300 then on the place. This is very clearly proved by the evidence of McGivern, (p. 20.) I am not sure, looking at various parts of the evidence, that her mind was ever thoroughly disabused of this understanding of Bench's offer. However, the matter is explained to her at McMillan's office on the 4th of July, by his clerk, McGivern, who then refused to draw any agreement between them, because of the prior larger offers. He says that Bench spoke disparagingly of these offers, and said none of them were genuine. So stands the matter till the 8th of July, when the parties again go to McMillan's office, and again is the refusal to draw the agreement between them because of the prior offers of \$3,800, and \$3,500, the former being Nathan Clark's, and the latter Leighton's. Before going to McMillan's office, Mrs. Gough, who is about 86 years of age, had drank one glass of liquor at the tavern, in company with Mrs. Bench. The latter took port-wine; to the former, Mrs. Middleton, the tavern-keeper's, wife brought what was guessed to be a wineglass-full of "Rye liquor," in a tumbler. This potent draught left unmistakable effects on the old woman, who was flushed and excited in McMillan's office, and later in the day at Myers's office. From the time that McMillan himself refused to draw the agreement the attitude of the plaintiff towards him changed—having expressed no distrust of him before that time, (a few minutes before, speaking of him as an honest man,) she forthwith after leaving the office stigmatized him in the bitterest terms as an enemy who wanted to keep her place for himself. The evidence of the defendant's wife shows very clearly the state of mind of the plaintiff on this day. "She said, 'I am starving and naked and I cannot get anybody else to give me the money but you,' (pp. 157, 165). She said, she was miserable and sick, and had no one to comfort her (p. 163). She was under the belief that she could not get cash from

anyone but my husband. (p. 173.) I expect she thought that she was going to get all the money in cash. (p. 172.) She said 'McMillan said he could get far more for it, but they want to keep it for themselves, and I am starving for money and McMillan knows it as well as anybody, but I will sell my place myself.' (pp. 156-7.) She was angry with McMillan, she did not say very good words, that he was a rogue. She said he was nothing but an old devil of a rogue, and she would have nothing to do with him." (p. 166) After McMillan's note of warning was brought to Myers's office, the plaintiff said, "Thank God that you have my place, and that I am rid of it and rid of those rogues too." (p. 158.) The sympathies of Mrs. Middleton, who supplied the liquor, are seen from her observation to the defendant, "Go with her when she wants the money so bad, somebody will get the place, and you may as well have it as anybody else." (p. 157.) From the evidence of Mr. Reddick who drew the agreement, it appears that the plaintiff did not believe that the offer of more through McMillan was genuine, (p. 177,) that she repeatedly said they were trying to rogue her out of her place, but that no one endeavoured to disabuse her mind of any such impression. (p. 201.) He also says that the parties were impatient to get the writing signed. The document itself was incomplete in parts, not in such a manner as to detract from its certainty, but going to indicate haste in its preparation and execution. The learned Judge, who saw the witnesses, gives credit to the testimony of McMillan. This witness shows us the condition of the plaintiff, and the suggestions of the defendant within a very short space (perhaps within an hour) of the completion of the transaction: "She seemed impatient, did not seem to comprehend what I desired her to catch. I could not impress upon her the situation. I endeavoured to impress upon her the fact that she could get \$800 more. I do not think I could get a satisfactory answer from her to that. I noticed she was restless, her face was flushed. She was different from what she used to be." (p. 14.) Bench was saying to her that it was a shame that her land was not

sold, that she was living in a poor state unsuited to her position, and the sooner she would sell the land the better, He thought it was a shame to allow an old woman to remain in that state." (p. 16) Bench said he would not wait one hour, he would have it closed then. (p. 16.) McGivern corroborates this, expressly upon the point of the old woman's condition on that day. "She was nervous and excited. Her face was very much flushed. Her manner was entirely different from her usual manner." (p. 20-1.) And also as to Bench's attitude: "He said something about not believing the offers that had been made, and it was a shame to keep the old woman in the condition she was." (p. 21.)

The evidence leads me to the conclusion that there was inequality between the parties in this, that the plaintiff was not so well able to protect her own interests as was the defendant to care for his. She capriciously rejected the advice of Mr. McMillan, and had no one else to look to. Her capacity (weak at best) was affected by her extreme age, by her distress from want of money, and the excitement caused by the glass of liquor, which might not have left traces on a younger and more vigorous person, such as the defendant. Illiterate, of intellect below the average, in needy circumstances, weighted with years, and confused with drink, she was plainly no match for the person with whom, abetted by his friends, she was dealing.

The other element in this case is the improvidence of the transaction. The decision complained of was to some extent influenced by the fact that no point of the plaintiff's pleading raises the issue of improvidence. But this is no of importance when all the evidence that could throw light upon the case has been given, as is admitted to be the fact here. In this view it is a mere matter of form to adapt the pleadings to the matters which have been proved *Burns v. Burns*, 21 Gr. 7. Here all the evidence given to induce the Court to cancel the agreement has its bearing upon the question as to how far it should be enforced at the defendant's instance. The absence of

pleading does not disqualify the Court from holding its hand when enough can be drawn from the plaintiff's witnesses to justify this course: *Stanley v. Robinson*, 1 & R. My. 527. As put by Lord Lyndhurst in *Beasley v. Collins*, Younge 327: "It is a principle in equity, that the Court must see its way very clearly before it will decree a specific performance, and that it must be satisfied as to the integrity and good faith of the parties seeking its special interference." Upon the facts the transaction must be deemed an improvident one if the evidence is credible as to the actual offers made for it by others, both before and after the sale to the defendant.

I see no reason to doubt that at the time the plaintiff was taking \$3000 for the farm, of which only one third was payable down, she could have obtained and was actually offered for it from \$500 to \$800 more, and on better terms of payment. The plaintiff has clearly made out that the price offered by the defendant was inadequate. The finding of the learned Judge that the defendant was guilty of no fraud, perhaps may preclude the Court above from adopting the language of Eyre, C. B. in *Griffith v. Spratley*, 1 Cox 384, when he says "it may be strong evidence of fraud when you find distress on one side, and money on the other. Inadequacy of price goes a great way in warranting the Court to infer from this that some sort of fraud was used to draw the other party into the bargain."

Inadequacy of price to the extent to which it is found in this case would not *per se* make materially against the transaction, but coupled with such surroundings as are in evidence here, it is a fact of great moment. To my mind it induces the conclusion that for some reason the plaintiff was not able to exercise, or at all events did not exercise a sound and unbiassed judgment in closing with the defendant as and when she did. There was not that free, deliberate choice, in the hurried and passionate rejection of an advantageous offer, and the acceptance of one in every way less beneficial, to which this Court should compel the plaintiff specifically to adhere. To whatever cause the

plaintiff's conduct can be attributable, whether to her being unreasonably and whimsically prejudiced against Mr. McMillan, and suspicious of his truth and honesty, or to her having taken liquor of such strength as to unsettle her mind, or whether her weaknesses were played upon and her cupidity tempted by the promise of ready money to relieve her necessities, or whether there was the blended operation of all these causes, still the result remains that when she might have had \$3,500 or \$3,800, she preferred to take \$3,000. In *Martin v. Mitchell*, 2 J. & W. 413, Sir Thomas Plumer, M. R., taking into consideration the age of the persons, their poverty, that they were acting without their attorney, that the property was reversionary and that the price was not the full value, declined to interfere. As put in the head note, specific performance was refused of a contract improvidently entered into by ignorant persons. Such is the present case, and such should be in my opinion the proper judgment of the Court. I may here cite the apposite language of Lord Justice Knight Bruce, in a like case before the Privy Council in 1863: "It is not the habit of a Court of Equity to decree the specific performance of an agreement more favorable to the plaintiff than the defendant, involving hardship upon the defendant and damage to his property, if he entered into it without advice or assistance, and there be reasonable ground for doubting whether he entered into it with a knowledge and understanding of its nature and consequences": *Vivers v. Tuck*, 1 Moo. P. C. N. S. 526.

As pointedly put in one of the cases, where incapacity and inadequacy go hand in hand the Court may refuse to enforce the contract, although the purchaser was guilty of no greater fault than making a hard and unconscientious bargain.

The contract will stand good, for whatever damages the defendant may be able to recover thereunder, (*Willan v. Willan*, 16 Ves. 83,) upon a reference to the Master of this Court, if he expresses his desire for such a reference

within ten days after this judgment is delivered, according to the practice settled in *Casey v. Hanlon*, 22 Gr. 445. As to costs, the old rule would be to give the defendant the costs occasioned by the plaintiff's failure to cancel the agreement, while the plaintiff should get the costs occasioned by the defendant's failure to enforce the contract specifically ; but the preferable plan (in order to avoid the expense and trouble of apportionment, and in mercy to both parties), is that propounded by Lord Cranworth in *Jones v. Farrell*, 1 DeG. & J. 208, when he said "the best practical course is to cut the knot by saying that there shall be no costs given or received."

As the plaintiff succeeds on the only branch of the case argued before the Divisional Court, she should get her costs of that application. If a reference is desired by the defendant, further directions and costs of that reference will be reserved.

PROUDFOOT, J., concurred.

A. H. F. L.

[CHANCERY DIVISION.]

MCINTYRE V. THOMPSON ET AL.

Mortgage—Parol evidence.

A mortgage was made by T. to W., who assigned it to M. No money was actually advanced on the mortgage by W., but before the said assignment to M., a parol agreement was come to between M. and T. that M. should hold the mortgage as security for a debt which T. owed to M. on a promissory note.

Held, that M. was entitled to hold the mortgage as security for the amount due him from T.

The rule that a mortgage for a specific sum may be shewn to be for other purposes by parol evidence, is not confined to cases where the person having the legal estate is the original mortgagee whose claim has been paid off, and with whom the new agreement for security has been made. The same principle must apply whenever the legal estate becomes vested in the creditor by the agreement of the mortgagor, as here.

THIS was an appeal from the report of the Master at Lindsay, made in a mortgage action. The action was brought by Margaret M. McIntyre; and the defendants by original bill were John Thompson, the mortgagor, and John McSweyn, trustee for the creditors of the said John Thompson. By his report, dated March 22nd, 1883, the Master found one Philip Sandford Martin to be an incumbrancer on the lands in question by virtue of a mortgage, dated January 5th, 1880, made between John Thompson and his wife, a party thereto for the purpose of barring her dower, and the Western Canada Loan and Savings Company, and an assignment thereof, dated February 28th, 1880, from the said company to him, and he found the sum of \$345.38 as due to Martin on the said mortgage, inclusive of his costs.

The circumstances of the case appear from the judgment and notes appended.

The appeal came up for hearing before Proudfoot, J., on November 15th, 1883.

Lash, Q. C., for the defendant McSweyn. What was done here cannot in any event amount to more than an equitable assignment. It was not an equitable mort-

gage by deposit, for nothing was deposited. See *Ex parte Whitbread*, 1 Rose 299; *Inglis v. Gilchrist*, 10 Gr. 301. Martin claims through the company, and can claim nothing more than the company could. All the Master had to do was to take an account of what was due on the mortgage, not of what was due by virtue of a collateral agreement with Martin. Moreover the arrangement with Martin was a verbal executory contract, and was void under the Statute of Frauds. Besides, there was no consideration for the agreement—no time was given, and a past debt was not enough to support an executory contract. I refer to *Ex parte Coombe*, 1 Mer. 7; *Re Beavan*, 4 Madd. 249. In any event Martin should not have had costs.

Moss, Q. C., contra. Martin was not in the position of solicitor for Thompson—he was solicitor for the company. Beside, the debt due to him was on a promissory note, and was not a debt arising out of any such relation. McSweyn can occupy no higher position than Thompson. As to this, see *Kitching v. Hicks*, 19 C. L. J. 59, 277 (a); *Parkes v. St. George*, 2 O. R. 342; *Re Howe*, 1 Paige (N. Y.) 126. McSweyn is a voluntary assignee—he is not like an assignee in insolvency. Martin was to stand in the same position as if Thompson had given him a charge on the land in the mortgage, and he holds the legal estate. He was a creditor, and was pressing for payment, and he forebore on getting security. Nor is it any objection that the money was payable in twenty instalments. The company might be looked upon as trustees for Martin if Thompson had so directed them, and that is virtually the case here. An agreement to give a mortgage will be enforced in equity: *Jones on Mortgage*, sec. 163, 182. The agreement and the deposit of the mortgage were sufficient to constitute an equitable mortgage: *Roberts v. Croft*, 24 Beav. 223. The Master had authority to determine this question. That point, however, is not taken in the grounds of appeal. I refer to *Inglis v. Gilchrist*, 10 Gr. 301; *Brownlee v. Cunningham*, 13 Gr. 586; *Morrison v. Robinson*, 19 Gr.

(a) A full report of this case will appear in 6 O. R. or 7 O. R.

480; *Stirling v. Paley*, 9 Gr. 343; *Kitchen v. Boon*, 24 Gr. 195; *Darling v. Darling*, 18 C. L. J. N. S. 425; *Teeter v. St John*, 10 Gr. 85; *Barr v. Barr*, 15 Gr. 27; *Muir v. Dunnet*, 11 Gr. 85; *Campbell v. Durkin*, 17 Gr. 80.

December 12th, 1883. PROUDFOOT, J.—Appeal from the Master at Lindsay.

Thompson owed Martin on a note for \$299, on which \$70 had been paid. Martin was pressing for payment. Thompson then applied to him as agent for the Western Canada Loan and Savings Company to procure him a loan of \$2,600, which was to pay Martin as well as some other claims against him, and when the application was made it was understood between Martin and Thompson that Martin was to receive the amount due to him out of the proceeds of the loan. When the mortgage was sent to Martin to get it executed by Thompson, it was spoken of between them that it should stand as a security for Martin's claim, which was to be regarded as a present advance.

The company refused finally to advance the money on the mortgage on account of some defect in the evidence of title, and Martin obtained from the company an assignment of the mortgage on the statement to them that he had made an advance to Thompson upon it. This was not strictly accurate, but it was in accordance with the agreement or understanding between him and Thompson (*b.*)

Two questions arise upon this state of facts, viz: Was there the agreement between Martin and Thompson as alleged by Martin, and if there were, is it one that can be enforced, if proved only by parol evidence.

Although there are some discrepancies in Martin's evidence that naturally lead to remark, they are not of such moment as to induce me to come to a different con-

(*b.*) The mortgage was expressed to be made in consideration of \$2,600, and the proviso for redemption was on payment of \$5,553.40 in gold coin in twenty equal consecutive yearly instalments of \$277.67 each, on January 1st, in each year.

The expressed consideration of the assignment from the company to Martin was \$2,600 to them paid by the said assignee.

clusion from the Master on the question of fact; and the Master finds that there was such an agreement (b.)

The grounds of the present appeal, which was by the trustee for the creditors, as stated in the notice thereof, were as follows:—

1. That Philip S. Martin is not a subsequent incumbrancer as found by said report on said lands for any sum whatever, inasmuch as the instrument (if it possessed any validity at all) by the deposit of which he claims to be an equitable mortgagee was the property of the Western Canada Loan and Savings Company, and is admitted by him to be such by his subsequently procuring from them an assignment of it.

2. That Martin's evidence is inconsistent with the said instrument and contradictory of it, which instrument, if at all valid, belonged to the company, who were to advance upon it the loan out of which they were to first pay off existing incumbrances, and is consistent only with an equitable assignment to Martin of part of the fund to arise out of the transaction, contingent upon the company's acceptance of the title.

3. This instrument called a mortgage never became a mortgage, the title having proved unsatisfactory to the intended mortgagees, and it is a proper inference from Martin's depositions that all title deeds were in the custody of the prior mortgagees referred to by him.

4. There is not here that deposit of title deeds which without more will constitute an equitable mortgage, and the said finding by the Master is inconsistent with the whole transactions, and established an interest in land upon parol evidence, while the statute requires it to be evidenced by writing.

5. The report ought not in any case to have certified for costs to the said Martin in the said proceedings in the Master's office.

A number of cases has established that a mortgage for a specific sum may be shewn to be for other purposes by parol evidence: *Penn v. Lockwood*, 1 Gr. 567; *Inglis v. Gilchrist*, 10 Gr. 301; *Brownlee v. Cunningham*, 13 Gr. 586; *Morrison v. Robinson*, 19 Gr. 480.

But these were said to be cases where the person having the legal estate was the original mortgagee whose claim had

(b) The judgment of the Master was as follows:—"I think there can be no question that if the defendant (Thompson) agreed with Mr. Martin that the mortgage should stand as a security for his claim that it can so stand, and Mr. Martin says distinctly in his evidence that this was the agreement: that it was especially made at the time the mortgage was executed when he feared it might not go through: and that he relied upon that arrangement, and not on the first one when the application was made. This being so, he is entitled to the amount of his lien and interest."

been paid off, and with whom the new agreement for security was made. It does not seem to me that that makes any difference. The same principle must apply whenever the legal estate becomes vested in the creditor by the agreement of the mortgagor, as was the case here. The agreement as found by the Master was, that the mortgage should stand as a security for Martin's claim. Without any assignment, although the company could have made no claim for an advance by themselves, they might have declined to release the mortgage without the consent of Martin. When the assignment was made it was, under the evidence, only a carrying out of the intention of the parties that Martin should be enabled to hold it as security for the amount due him.

I also think that this was a matter quite within the competence of the Master to decide. Indeed, in most, if not all, of the cases cited, the Master seems to have entertained such questions, and without any disapproval by the Court.

It was argued that the mortgage was not deposited with Martin as a security, but that it got into his hands as agent for the company. If looked at in this light, then the company must be affected with notice of the agreement: that it was to be held as security for Martin's claim, and they could then refuse to release or quit claim without his assent; and the existence of the debt would be a sufficient consideration for the deposit; the agreement was so far executed.

I do not think that any difficulty arises from the mortgage being made payable in twenty annual instalments. The original intention was, that out of the proceeds of the expected loan Martin should be paid in cash. When the loan failed, and there was the agreement that the mortgage should stand as a security for the same debt to Martin, it was an agreement for an immediate charge, payable on demand.

The appeal is dismissed, with costs.

A. H. F. L.

[CHANCERY DIVISION.]

BEATTY V. HALDAN.

Appeal from Master—Ascertaining amount due by administrator pendente lite to an estate—Moderation of his solicitor's costs.

On an appeal from a certificate of the Master in which he held that under an order which directed him "to ascertain and state what amount, (if any,) is properly chargeable by J. H. against the estate of T. W. deceased in respect of legal proceedings taken by the said J. H. as administrator *pendente lite* of the said estate in the Courts or otherwise," the bills of costs of the solicitor of the administrator should be taxed in order to ascertain the amount due. It was—

Held, that the Master was wrong; that the bills should, if necessary, be subjected to moderation, and not taxation; that moderation is a well understood term, and is more liberal than taxation even as between solicitor and client.

THIS was an appeal from a certificate of the Master in Ordinary.

The suit was brought by Charles Beatty and James Wilson against John Haldan, Joseph Aloysius Donovan, and Mary Ellen Wilson' to open up and retake the accounts of the said John Haldan, who was the administrator *pendente lite* of the estate of Thomas Wilson, deceased.

The accounts were accordingly retaken and a large balance was found due from Haldan to the said estate; and Haldan having petitioned to have the accounts retaken pursuant to the suggestion of the Court of Appeal in *Wilson v. Beatty*, 9 A. R., p. 149, *et seq.*, an order was made referring it to the Master to ascertain what amount (if any) was properly chargeable by the said John Haldan against the estate of Thomas Wilson, deceased, in respect of legal proceedings taken by said John Haldan as administrator *pendente lite* of the estate in the Courts or otherwise.

Upon the reference it was contended upon the part of Haldan that the bills of costs should not be subjected to taxation, but should merely be moderated; but the Master ruled that there had been no delivery or payment of the said bills which would preclude taxation, and that he

would proceed to ascertain the amount due said Haldan in respect of such legal proceedings by a taxation of the bills of costs relating to the same.

From this ruling the said Haldan appealed on the grounds that by the terms of the order of reference the Master was not required to decide whether there had been a delivery or payment of the bills which would preclude a taxation of the same; but merely to ascertain what amount (if any) was chargeable by said Haldan against said estate in respect of legal proceedings taken by said Haldan as administrator *pendente lite*, and that the said Master should have considered and dealt with said bills put in as vouchers in said Haldan's accounts, and should have proceeded by way of moderation of the same, and not by way of a taxation thereof.

The appeal was argued before Proudfoot, J., on the 30th day of September, 1884.

Hoyles and *F. J. Dunbar* for the appeal. The parties to this suit have been before the Courts on former occasions, as will be found by referring to *Wilson v. Beatty*, 9 A. R. 149. The learned Chief Justice in his judgment, at p. 159, says: "The order of this Court in *Beatty v. Haldan* should, so far as it relates to the costs of the solicitor, be varied. Instead of directing that the bill of costs of the solicitor should be referred to the Master to tax and moderate, the reference should be to ascertain and report what is properly chargeable by the administrator, &c. * * " Then again he says: "The previous taxation of costs, for the purpose of charging therewith the estate of the testator, and which, by the order of this Court in *Beatty v. Haldan*, was held to be not binding upon that estate, should be declared to be not binding upon the administrator, &c. * * " See also pp. 182 and 183, where Patterson, J. A., in his judgment says: "*Prima facie*, Haldan's right was to be allowed, in his accounts, what he had paid his solicitor for the conduct of the business of the estate. The rule may be quoted from

Williams on Executors, 8th ed., at p. 1868, where it is said: 'Again, if an executor pays an attorney for his trouble and attendance in the transacting and conduct of the testator's affairs, he ought to be allowed and repaid what he so pays. But an executor is not entitled to be allowed, without question, the amount of a bill of costs which he has paid, *bond fide*, to the solicitor to the trust; and the officer of the Court, without regularly taxing the bills, will moderate their amount.'" The Master holds that Haldan can tax the bills, and that the bills as between Haldan and the estate should be taxed, and our contention is that taxation is not intended, but that the Master may, if he thinks fit, moderate the bills, which is very different from taxing them: *Johnson v. Telford*, 3 Russ. Chy. R. 477; *Daniell's* Chancery Prac., 6th ed., 1058; *Lewin* on Trusts, 7th ed., 546; *McCargar v. McKinnon*, 17 Gr. 527.

O'Donohoe, Q. C., contra. The purpose of the reference is to ascertain the amount due between the administrator and the estate. It should not be a moderation merely. *Johnson v. Telford*, *supra*, is a case where the executors paid costs from time to time to the solicitor. There can be no payment until the delivery of the bills, and in this case no bills were delivered, nor was any payment made, but money was retained from proceeds of suits. There has been no taxation yet, and there is nothing to moderate, and the amount due cannot be ascertained without a taxation. There are no other means by which it can be ascertained. [PROUDFOOT, J.—"Moderation" will do that, and "moderation" is a term well understood.] In *Wilson v. Beatty*, at p. 160, the learned Chief Justice says: "There should be a new taxation between the solicitor and administrator." [PROUDFOOT, J.—But this is not a taxation between the administrator and solicitor—it is between the administrator and the estate.] The state of accounts cannot be ascertained without a taxation. A moderation is only applicable to cases where a taxation has been had: *Re Brown*, L. R. 4 Eq. 465; *Re Street*, L. R. 10 Eq. 167. There can be no payment without the delivery of the bills.

September 30, 1884. PROUDFOOT, J.—My present impression is, that Haldan is entitled to more than solicitor and client costs; but the wording of the Master's certificate is ambiguous, and I will make the order conditional, that if the Master intended that Haldan is only entitled to solicitor and client costs, he is wrong; and the order can be retained until it is ascertained what the Master intends to do. "Moderation" of the bills is more liberal than "taxation," even as between solicitor and client.

If the Master holds that Haldan is only entitled to taxed costs, then his action is not in conformity with the judgment of the Court of Appeal and my order referring the matter to him. No order to go at present; but if, in the face of this expression of opinion, the Master goes on to "tax" the bills, the order will have to issue. The administrator (Haldan) should get his costs of this appeal, and may charge them against the estate.

G. A. B.

[CHANCERY DIVISION.]

VARDON V. VARDON.

Action for alimony—Right of the plaintiff to compromise—Enforcement of compromise—Separate negotiations for settlement carried on simultaneously between clients and the solicitors respectively—"Without prejudice" O. J. A. Rule 97.

Held (affirming the decision of WILSON, C. J. C. P.). A married woman can not only bring an action against her husband in her own name, but she can also compromise it, or deal with it as she pleases, just as any other suitor can; and if the plaintiff and defendant have agreed to certain terms of settlement of such a suit, such contract can be enforced against the defendant, by the plaintiff suing in her own name without a next friend.

And so in the present case where, by way of compromise of such a suit, the parties to it agreed that the plaintiff should execute a proper deed of separation containing certain covenants by her, in return for which the defendant should convey to the plaintiff certain lands and pay certain moneys.

Held, that the plaintiff was entitled to specific performance of this agreement: that it was not the separation which was being enforced, but the performance by the defendant of his contract.

If, in such a case negotiations with a view to a settlement are carried on between the parties and a settlement concluded by means of letters marked "without prejudice," the letters may be given in evidence to prove the binding contract notwithstanding the restrictive words.

Per WILSON, C. J. C. P. If parties to an action authorize their solicitors to enter into negotiations for a settlement, and while the negotiations are proceeding, one party unknown to his own or to the opposite solicitors, writes to the other party personally withdrawing from the negotiations, and the respective solicitors, not knowing what has taken place between their clients meanwhile, conclude the terms of a settlement, such settlement will not be binding on the party who had thus withdrawn from the negotiations, because the other party had direct notice of his withdrawal.

Semle, that if the principals had, between themselves, entered into an agreement, and the solicitors, in ignorance of what the clients were doing, had previously concluded a different agreement, the agreement made by the solicitors would bind, because prior in time.

On the same reasoning where the two principals negotiate, and either perfect a contract or put an end to proposals for one before the delegated power to their agents has been fully exercised, the acts of the principals are the binding acts, and the subsequent acts of the agents are of no avail as against their principals.

In this case, upon the letters and evidence set out below, it was held that the defendant had not withdrawn his prior proposals and abandoned the negotiations before a final arrangement had been come to by the respective solicitors.

THIS was an action brought by Mary Vardon, plaintiff, against Robert Vardon, defendant.

The statement of claim alleged that the plaintiff and defendant were married in 1861, and cohabited as hus-

band and wife until 1869 : that differences arose between them and they separated : that the plaintiff on September 9th, 1882, commenced an action for alimony against the defendant : that after the service of the writ the defendant made overtures for a settlement to the plaintiff, and proposed in writing—in consideration of the plaintiff not proceeding further with the said action, and executing a proper deed of separation containing covenants to execute from time to time, as the defendant might require, any deeds of real estate then or thereafter to be acquired by the defendant releasing her dower, if the defendant conveyed the same away ; and to release and indemnify the defendant against all further or future claims for maintenance and support, and give security for the performance of such covenants to the satisfaction of the defendant's solicitors that he, the defendant, would convey to the plaintiff or to a trustee for her absolutely in fee simple, the east half of lot No. 11 in the 3rd concession of the township of Maryborough, in the county of Wellington, and would release all claims he might have to any of the plaintiff's property, real or personal ; and would pay \$60 towards the plaintiff's costs of the alimony action, and of the expense connected with it : that the plaintiff prepared a deed of conveyance of the land to be made to her by the defendant, containing also a covenant for the payment by him of the said sum of \$60, and discontinued the action for alimony, and executed a proper separation deed containing the covenants required by the defendant, and the covenant of one William Hale as security for the performance by the plaintiff of her covenants : that the defendant refused to execute the conveyance of the land to the said William Hale as trustee for the plaintiff, containing the covenants to be given on the part of the defendant ; and the plaintiff also tendered to the defendant for execution the deed of separation duly executed by herself and her said trustee, but the defendant refused to execute the same.

The plaintiff claimed :

1. That the defendant might be ordered to execute a con-

veyance of the said land to the plaintiff as aforesaid, according to the terms of agreement, and to pay the plaintiff the sum of \$60.

2. Or in the alternative, damages for the breach of the said agreement.

3. That the defendant be ordered to pay the costs of this action ; and

4. Such other relief as the circumstances of the case might require.

The statement of defence alleged that the action for alimony was still pending ; that the negotiations for a settlement were " without prejudice," and the negotiations for a settlement having fallen through, his, the defendant's, right to defend the action for alimony, to which he had a good defence, was not impaired: that he entered into such negotiations, although the plaintiff had no ground for instituting her action for alimony, to avoid the public exposure of their domestic affairs, and to leave it still open to establish a reconciliation between them: that the plaintiff made such unreasonable demands during the negotiations that this defendant withdrew all his proposals for a settlement, and offered to receive the plaintiff back, that they might live together as husband and wife ; that the defendant did not immediately advise his solicitors of the fact of his having withdrawn his offer and " from all negotiations," but the plaintiff gave his, the defendant's, letter revoking his proposals for a settlement to her solicitors the morning after she received it, and they ' suppressing from the knowledge of the defendant's solicitors the fact that the defendant had broken off all negotiations of settlement, and withdrawn all offers, wrote a letter to his solicitors, purporting to accept a pretended prior offer of his, and insisted, and continued to insist, notwithstanding the explanations promptly made on his behalf, that a complete settlement was effected which they were determined to enforce by legal power against him:" that the plaintiff was attempting to perpetrate a fraud upon him by forcing him to carry out an agreement

which never was made : that the plaintiff never had cause for leaving the defendant, and he was ready and willing to receive her back : that he was not willing the plaintiff should live apart from him, and he was not willing to execute a deed of separation ; that he could not be compelled, unless for misconduct on his part, to execute any agreement for separation ; and even if a valid settlement of the alimony suit in terms alleged by the plaintiff was assented to on behalf of him, the defendant, yet as the same had never been actually carried into effect by the execution of deeds or otherwise, it was still open to him to withdraw therefrom, and he desired, if necessary, to do so.

The facts of the case, and the evidence adduced, appear in the arguments of counsel, and in the judgment.

The case came on for trial before WILSON, C. J., C. P., on May 5th, 1883.

G. T. Blackstock, for the plaintiff.

John Bain and *Seton Gordon*, for the defendant, asked leave to answer the statement of defence by alleging that a contract between husband and wife cannot be made in law, and cannot be enforced, referring to the Judicature Act, section 44 and rule 178.

[WILSON, C. J.—I will allow it, if necessary, as it goes to the root of the case. I shall consider it therefore as in issue.]

The evidence given showed the following questions to be in issue :

1. Whether the husband and wife could contract with respect to the action for alimony, and for separation, as it was alleged they had done ?

2. Whether such contract or quasi-contract could be enforced ?

3. Whether the negotiations were "without prejudice," and whether the correspondence of the proposed settlement, which had fallen through could be used in evidence ?

4. Whether the action for alimony had been discontinued ?

5. Whether the defendant withdrew his proposals for settlement because he believed the plaintiff had made and was making unreasonable demands upon him ?

6. Whether the defendant withdrew from the negotiation before it was completed by his communication to that effect directly with the plaintiff ?

7. Whether the agreement come to by the solicitors of the respective parties after such communication between the principals was binding ?

8. Whether the plaintiff's solicitors were informed by the plaintiff, and by the defendant's letter to her, of the withdrawal by the defendant from the negotiations before they wrote to the defendant's solicitors accepting the prior proposal of the defendant's solicitors as a final bargain ?

9. Whether the defendant's solicitors were aware their client had withdrawn from the negotiations, and although the plaintiff's solicitors were aware of it, did they withhold that information from the defendant's solicitors, and is the assent which was given by the defendant's solicitors binding on the defendant ?

10. Whether the defendant also agreed to pay the \$60 costs ?

Seton Gordon, for the defendant. The Court will not enforce specific performance unless in very plain cases. There was no agreement ever actually made. The solicitors for the parties corresponded up to October, 20th, 1882, and the correspondence was not concluded until after 5.20 p.m. upon that day. But before that time the parties had direct communication putting an end to the settlement. On October 19th, the defendant wrote to the plaintiff a letter withdrawing from all negotiations for a settlement, and he posted it that day. The plaintiff received it about noon of the 20th. The posting of the letter on the 19th was notice to the plaintiff as of that day: *In re National Savings Bank Association, Hebb's Case*, L. R. 4 Eq. 9. It was not necessary the defendant should have communicated that letter to the plaintiff's solicitors ; it was sufficient to communicate it to the plaintiff, and any-

thing which her solicitors did after that was not binding upon the parties. The letter of the plaintiff's solicitors of the 20th of October, if it is to be considered as the closing of the bargain as between the solicitors, has no effect upon the defendant, because that was not delivered to the defendant's solicitors till 2.30 p.m. of that day, and the plaintiff had by noon of that day received the defendant's letter. But as that letter of the plaintiff's solicitor desired the defendant's solicitors to answer if the letter of the plaintiff's solicitor was satisfactory, and that answer of the defendant's solicitors was not sent till after 5.20 p. m. of that day, that is the hour at which the bargain as between the solicitors is to be considered as complete. The defendant's solicitors would not have written their letter of the 20th if they had known of their client's letter of the 19th to the plaintiff. No case can be found of a mere agreement for separation being specifically enforced. The wife cannot personally contract. There is no mutuality. It is necessary there should for that purpose be the intervention of a trustee: *Fry* on Spec. Perf., 1st ed, pp. 72, 401. The negotiations were "without prejudice," and the correspondence cannot therefore be used.

Blackstock, contra. The defendant's case is :

1. There was no concluded agreement between the solicitors, and,
2. If there were the Court will not enforce it.

As to the first point. The letter of the defendant of October 19th, to the plaintiff should have been communicated to the plaintiff's solicitors before it could have any effect on the negotiations going on between the solicitors of the respective parties, and the plaintiff's solicitors did not receive the letter of the 19th until the 21st, and the bargain between the solicitors was concluded on the 20th. The solicitors of a client may act for him until they know their authority has been revoked: *Evans* on Principal and Agent, p. 107; *Pristwick v. Poley*, 13 W. R. 753; *Re Wood, Ex parte Wenham*, 21 W. R. 104. The substantial terms of the agreement were settled as early

as the 27th of September, 1882. The earlier correspondence related to a good title to the property the defendant was to convey, the possession and dispossession of the tenant in occupation, and about the security the plaintiff was to give not to interfere after the separation with the defendant. The plaintiff agreed later on, upon October 12th, to pay \$50 to the plaintiff towards her costs. The defendant's solicitors on the 16th, 18th, and 20th of October, recapitulate the terms for settlement. The solicitors of the parties were on the 20th October *ad idem*. It is contended the defendant's letter of October 19th, is not to be considered as a withdrawal from the negotiations, because it is based upon an assumption and belief of facts which were not correct. It states that he has found from his lawyer that his offers had not been satisfactory, and he had made up his mind to change his proposition and make another offer, which he then makes, that his wife might return to him. At that time his offers were satisfactory, and he said in his examination before the examiner :

60. Q. . . . Will you swear Mr. McDougall told you on the 18th of October that that offer was not accepted ?

A. Yes. I understood him that there was nothing accepted. If I had understood that the offer was accepted I would not have written the letter (of the 19th.)

63. Q. But if she was satisfied with the offer you did not want to go back on it ?

A. If she had accepted it I should not have done it.

64. Q. You would have carried it out ?

A. Yes.

65. Q. And the reason you wrote that letter was because you understood she had not accepted the offer.

A. Yes.

66. Q. You did not want to go back on your offer ?

A. I wouldn't if it was accepted.

67. Q. Why do you want to go back on it ?

A. Because she didn't accept it.

68. Q. Have you any other reason ?

A. No.

The defendant also said he did not want to carry out his offer because he intended to try to get his wife to come back and live with him.

It appeared also in evidence that Mr. McDougall read to the defendant his, McDougall's, letter of the 16th of October, and defendant did not then withdraw it, or desire him not to negotiate further.

It is contended, therefore, that the defendant could not withdraw from the negotiation and settlement : that Mr McDougall's first letter of the 20th of October closed the settlement : that the defendant's letter of the 19th of October is not, under the circumstances, a withdrawal of his former offer : that the contract can be specifically performed, although the deed of separation has not been executed. I refer to the following cases : *Wilson v. Wilson*, 1 H. L. Cas. 538 ; *Hart v. Hart*, 18 Ch. D. 670 ; *Cahill v. Martin*, L. R. 7 Ir. Ch. 361 ; *R. S. O. c. 125*, secs. 19, 20 ; *Gibbs v. Harding*, 5 Ch. 336 ; *Fry on Specific Performance*, 2nd ed., p. 648. The case of *Standerling v. Hall*, 11 Ch. D. at p. 655, shews a married woman has the right to sue on a compromise (a).

June 6th, 1883. WILSON, C.J., C.P. [After stating the facts.]

1. Can the husband and wife contract one with the other, with respect to the action for alimony and for separation, as it is alleged they have done ?

It is not necessary to go beyond the facts of this case. The general rule is they cannot contract one with the other, but I need not say how far and in what form, and for what purpose they can contract. It is sufficient for this case to say that the plaintiff had an action for alimony in her own name as plaintiff against the present defendant.

(a) The above statement of facts and arguments of counsel is taken from the judgment of the learned Chief Justice.—*REP.*

and which she had the power to bring and maintain, and having that power she could prosecute or compromise, or deal with it as she pleased, just as any other suitor could. The cases referred to in the argument of *Besant v. Wood*, 12 Ch. D. 605; *Hart v. Hart*, 18 Ch. D. 670, are directly in point. It is not required that the action for alimony, or this action should have been brought by her next friend.

Rule 97 and the case in 18 Ch. D., 670, just referred to, determine that.

In the last case on the subject, *Rose v. Rose*, 8 P D. 98, in appeal, Jessel M. R., said: "It is absurd to say that a married woman is competent to commence a suit but is not competent to compromise it."

2. Whether the contract or quasi contract in question between husband and wife can be enforced against the husband?

Again the answer is given by express decision: *Wilson v. Wilson*, 1 H. L. Cas. 538, and the two cases last referred to, shew the contract can be enforced.

It is not the separation between husband and wife which is enforced, it is the performance by the defendant of the contract he entered into to convey the land he agreed to convey to the plaintiff. It is, as was said by the Lord Chancellor in *Wilson v. Wilson*, *supra*, at p. 572, "to enforce a contract respecting property, growing out of such separation."

3. Were the negotiations, which were in writing between the solicitors, without prejudice?

They were down to a particular date, and the correspondence on each side was so marked, but after that date the words "without prejudice," were discontinued. That, however, would make no difference, for the parties were plainly trying to accommodate a domestic trouble, and to make a peaceable arrangement which would not embitter the feeling between husband and wife, if unhappily the negotiations failed.

But Mr. Sampson (b) said, on behalf of the plaintiff he desired the correspondence should not be so clogged, for he desired a contract to be made, and which when made could be enforced. He did not use these words, but I inferred that was what he meant, and it was agreed by the defendant's solicitors the further correspondence should not be so hampered. That statement of Mr. Sampson was not assented to by the defendant's solicitor, Mr. McDougall. As a fact, the correspondence was continued after that without these restrictive words.

In my opinion whether they were there or not makes no difference. For if the negotiations have failed, the terms of the negotiations fail too; while if a contract has been perfected the qualifying words are no longer operative.

It was contended, however, by the defendant's counsel, that the correspondence cannot be referred to, even to enforce the contract, so long as the negotiations by which it was effected were carried on "without prejudice."

But that would lead to this result. If A. made a proposal "without prejudice," and B. wrote an answer accepting and closing with the proposal, and, I will assume, he too added "without prejudice," so that that was a perfect contract, yet it could not be enforced. I received the correspondence to enable me to say whether there had or had not been constituted a binding contract.

4. Has the action for alimony been discontinued?

I find it has. I do not say by the formal entry of a discontinuance on the proceedings, but it has not been prosecuted, since the proposals for a settlement were made. It is like the case of *Hart v. Hart*, 18 Ch. Div. 670. The parties signed an agreement "petition and answer dismissed," &c. But it does not appear there was any actual dismissal of the proceedings. The case says: "In pursuance of this agreement the trial was not proceeded with."

(a) Mr. Sampson was a member of the firm of the plaintiff's soli

The remaining questions, from 5 to 10, I shall consider together, and answer them separately.

I find the defendant did write his letter of the 19th of October, and, as he says, he withdrew his offers before then made for a settlement, upon the assumption and belief that the plaintiff had not accepted his proposals. Whether he did in fact withdraw his former offer I will hereafter consider.

The following correspondence relates to this part of the case.

On the 16th of October Mr. McDougall, on behalf of the defendant, wrote to the plaintiff's solicitors, "with a view to put an end to the litigation in this matter, and to avoid the making public our client's domestic difficulties and misfortunes, we have to make the following propositions :

1. Mr. Vardon will convey to Mrs. Vardon, or to a trustee for her, the Maryborough lot, free from incumbrances.

2. Mr. Vardon will covenant that the present tenant has no title to the possession of the fifty acres of said lot in occupation by him other than that conferred upon him by the expired lease, and that no new arrangement or understanding has been had with the said tenant since the termination of the written lease.

3. He will pay towards the costs of Mrs. Vardon in this whole matter, including the settling of conveyances and of carrying out the details of the settlement, the sum of \$60, only.

4. He will require a proper deed of separation drawn and executed, which must contain covenants on the part of Mrs. Vardon to release and indemnify him against all further or future claims for maintenance and support, in consideration of this settlement; and a covenant to execute from time to time, as he may require the same, any deeds of real estate acquired or to be acquired by him, releasing her dower, should he desire to convey the same. And there must be some security given by Mrs. Vardon to the satisfaction of Mr. Vardon's solicitors for the performance on her part of the covenants above specified.

5. He will release all and any claims he may have to any of Mrs. Vardon's property, real or personal."

On the 18th of October, the plaintiff's solicitors answered: "Your letter respecting the title to and possession of the Maryborough lot does not go quite far enough to protect our title. In addition to the ordinary covenants for title, we wish your client to covenant that the present tenant has no title to the possession or occupation of any portion of the 160 acres, other than that conferred upon him by the expired lease, which was submitted for perusal to our Mr. Sampson: that your client will, if necessary, give evidence, or make affidavit to that effect when requested: that if it turn out for any reason not referable to the fault of the plaintiff, her solicitor or agent, that the tenant has any title beyond that covenanted for by your client, then this settlement shall be off, and your client will pay the costs of any proper proceedings to get rid of the tenant instituted by the plaintiff upon the faith of the representations of your client as to the title of the tenant. We must insist upon this, in addition to the terms proposed in yours of 16th instant, as under other circumstances our client's interests would be very insecure. We think this the least she ought to be asked to accept. We need not add, of course, that the defendant must shew a good title to the 100 acres. Please let us know at once if you accept this."

On the 20th of October the defendant's solicitors wrote to the plaintiff's solicitors repeating and accepting the additional terms proposed in the plaintiff's solicitors' letter of the 18th, and the defendant's solicitors conclude, "we trust this will be satisfactory to you."

On the 20th of October the plaintiff's solicitors wrote to the defendant's solicitors: "Yours of to-day at hand. In reply we beg to say that on the part of the plaintiff we accept the offer of settlement contained in yours of the 16th and 20th instant; conditional only, of course, upon the defendant shewing a good title to the 100 acres. If this is satisfactory, please say so to-day."

And on the same day the defendant's solicitors wrote:

"Your favour of to-day at hand. We concur in the terms of the proposed settlement as covered by our letters of the 16th and 20th, and your replies thereto."

The inquiry is, how far the negotiation had proceeded at the time Mr. McDougall read to the defendant his, Mr McDougall's, letter of the 16th of October.

The defendant's solicitors by letter of the 18th of September, among other things, required security to be given by the plaintiff for the due performance by her of her covenants.

On the 27th of September the plaintiff's solicitors accepted the offer of the 18th, but required the defendant to get rid of the tenant, who it is said asked \$200 before he would surrender; to pay all the plaintiff's costs; and give up any interest he had in the plaintiff's property; and they refused to provide for the plaintiff giving security for the performance of her covenants.

On the 5th of October the defendant's solicitors, having seen their client, wrote that the defendant assented to give up all claims on the plaintiff's property; and said the defendant might pay the plaintiff's taxed costs at a reasonable amount; and that they would consider about the plaintiff giving security.

On the 12th of October the defendant's solicitors offered their ultimatum:

1. He will convey the land to the plaintiff.
2. He will give assistance to dispossess the tenant by giving evidence or making affidavits.
3. He will pay towards costs \$50.
5. He will require a proper deed of separation containing covenants by the plaintiff to release her dower from time to time, as he may require it; to release him from her support.
5. The plaintiff must give security to the satisfaction of defendant's solicitors for the due performance of these covenants; and
6. The defendant will release any claim he has on her lands.

It does not appear there was any answer to the letter of the defendant's solicitors of the 12th of October.

On the 16th of October the defendant's solicitors repeat in effect their terms of the 12th, which letter of the 16th is above stated.

In the later propositions something more is stated which the defendant was willing to do about getting rid of the tenant, and he agreed to pay \$60 in place of \$50 for costs.

The terms of the deed of separation remained as before stated, requiring security for performance by the plaintiff of her covenants.

The answer of the plaintiff's solicitors of the 18th of October, to the one of the 16th, above stated and referred to, had not, as I make out from the evidence, been received by the defendant's solicitors when the defendant called upon them, and the following conversation took place between Mr. McDougall and the defendant :

Mr. McDougall said in cross-examination by the plaintiff's counsel : " Sometime on or after the 16th of October, I saw the defendant, and he asked me how matters were progressing. I got my letter book, and I said matters were shifting so much on the other side that it was a question whether he would bother about trying to make a settlement, and that there was some refusal to give security. In a later part of the day the defendant asked if there was any objection to his seeing his wife. I said there was not, and I urged him to do it. He said he had not made up his mind, but he was disgusted with the delay, and when he went home he would think how he should act. I told the defendant we had not come to terms ; he was annoyed at the question of costs. I said to the defendant it was very likely the plaintiff's solicitors would not accept the terms of that letter. Until the 20th October we were never at one—changes till then were being made all the time."

I think it appeared Mr. McDougall read his letter of the 16th of October to his client, and that his client did not tell him to withdraw it, or to stop the negotiations. Upon

that day, and up to the time that letter was read to the defendant, the plaintiff had not agreed to give security for the performance of her covenants, and the full terms relating to the dispossession of the tenant had not been settled. The letter of the 18th of October of the plaintiff's solicitors, in answer to the one of the 16th, shows that still more was required to complete the arrangement about the dispossession of the tenant, and nothing is said in that letter of the 18th about the plaintiff agreeing or not agreeing to give security for the performance of her covenants. That was the position of the treaty when Mr. McDougall read his letter of the 16th of October to his client, the letter of the 18th from the plaintiff's solicitors not then having been received by the defendant's solicitors.

Mr. McDougall was warranted in telling the defendant that the solicitors for the parties had not come to terms, and there was some refusal to give security, and he might no doubt think it was likely the plaintiff's solicitors would not accept the terms offered by the letter of the 16th of October, inasmuch as he said that to his client. The defendant was right in accepting that information as correct, and he no doubt acted upon it when he wrote the letter of the 19th of October to his wife.

If that letter of the defendant was a withdrawal of all proposals for settlement theretofore made, it was based upon the true state of things as they existed upon the 16th, and even up to the 19th of October, for the solicitors have no written correspondence after the 16th until the 20th, excepting the letter of the plaintiff's solicitors, which said nothing of security for the performance of covenants, which was still an unsettled term, and which required some further provision respecting the dispossession of the tenant. The letter of the defendant of the 19th of October is as follows:

WHITEVALE, October 19th, 1882.

DEAR MARY.—I found out by my lawyers on yesterday that neither of the offers that I have made is satisfactory, and I have made up my mind to change and make you one

more offer, and that is, to wind up your business, and come home to me as soon as possible, and I will provide as good a home as possible. I can get the tenant off the farm right away, and we can move on the farm by the time we can get ready. I expect to hear from you soon.

Yours truly,

R. VARDON, Whitevale."

That letter was said not to be a withdrawal of the former offers, because it was said to have been written on the mistaken idea and belief that the defendant's previous offers had not been accepted. But I think it was written upon the actual state of facts and condition of the negotiations, for they shew the offer had not been accepted at that time.

I am not, however, satisfied the letter of the 19th of October is a withdrawal of the former offer, or a revocation by the defendant of his solicitors' authority to continue these negotiations.

The defendant does not in terms say he withdraws the former offers, but being informed they are not satisfactory, he makes up his mind to change, and to make one more offer.

Mr. Macdougall does not seem to have thought his authority was withdrawn from anything his client had said to him, because he said, not hearing from his client after he had seen him on the 16th of October, and having got the letter of the 18th of October from the plaintiff's solicitors "the correspondence was continued," and he wrote the first letter of the 20th of October to the plaintiff's solicitors. They answered him the same day, and he answered that by his second letter of that day, and it was not until the following day he saw his client. But it may have been later than that, for he said he must have got the instructions of his client on the 23rd or 24th of October to write the following letter of the 25th to the plaintiff's solicitors.

"Our client has instructed us that he is willing now to receive his wife back, and provide for her support and maintenance, and that he has written to her to that effect,

and further instructs us to withdraw any offer of settlement made by us."

And again, on the 5th of November, he wrote to the plaintiff's solicitors. After referring to the offer already made by his client to receive his wife back, he says: "Should she decline to return to him, he instructs us to discontinue considering any settlement. We have, therefore, no authority to make any suggestions as to the enclosed document, and beg to return same to you."

The enclosed document was the deed of separation which had been sent by the plaintiff's solicitors to the defendant's solicitors for perusal and adoption.

The case then stands as to the particular stage of it now referred to in this way. The defendant's solicitors made the proposition for settlement contained in their letter of the 16th of October. After it was written and sent, and probably on the 18th of October, because the defendant in his letter of the 19th says: "I find out by my lawyer on yesterday," &c., and before the letter of the plaintiff's solicitors of the 18th was received by the defendant's solicitors, the defendant had read to him the letter of the 16th, and did not desire it to be withdrawn, nor did he request his solicitors to discontinue the negotiations, and they did not discontinue them, but carried them through to a successful termination on the 20th.

The defendant's solicitors had no knowledge what the defendant had done up to that time, nor until the following day, nor even it may be later than that. Nor had the plaintiff's solicitors; for they did not receive the letter from their client, which she had received from the defendant, until the 21st of October, according to the entries in their book, and the evidence of Mr. Sampson and Mr. MacMurchy, nor until late on that day. It was received by the post. Nor did they see her between the 20th and the 25th of October. The plaintiff herself, however, received it about noon on the 20th of October. The letter from the defendant's solicitors of the 25th of October is the first intimation they had that their client had with-

drawn the authority from them to make any settlement, and the first intimation the plaintiff's solicitors had of that fact.

The letter does not say he repudiates what his solicitors had done before that day, nor does he say that he had taken the matter into his own hands, and that their acts after that, or in consequence of it, were nugatory, but simply that he "instructs us to withdraw any offer of settlement made by us."

I am not disposed to consider the letter of the defendant to his wife, interpreted by the surrounding circumstances to which I have referred, as an abandonment of the negotiation then going on between the solicitors, or as a revocation of the authority of his solicitors to continue the negotiation, unless I am obliged to do so. And I may say the defendant's answers in his examination, if they can be referred to, confirm the opinion I have formed as to the facts.

The question then is—assuming the defendant's letter of the 19th of October to his wife to be in law a withdrawal of his former proposals,—what effect had such withdrawal while his solicitors still continued empowered by him to carry on the negotiations for settlement, and concluded one with the plaintiff's solicitors, contrary to his own offer made to the plaintiff, the solicitors of both parties having no knowledge at the time they closed their terms of the defendant's letter of the 19th of October?

The doctrine of agency rests upon authority, express or implied, conferred by the principal. That implication arises according to the position or relation of the parties one towards the other, or according to the duties which have to be performed.

As between solicitor and client, it is said the solicitor has power to compromise the action, not only without but contrary to the wishes or direction of the client, so long as the other party has not notice of such fact: *Swinfen v. wSinfen*, 18 C. B. 485; *S. C.* 1 C. B. N. S. 364; *Butler v. Knight*, L. R. 2 Ex. 109; *Berry v. Mullen*, I. R. 5 Eq. 368; *Re Wood, Ex parte Wenham*, 21 W. R. 104.

If the defendant had not communicated with the plaintiff by his letter of the 19th of October, which she received about noon of the 20th, and which, as I have said, I am assuming to have been and to be a withdrawal of the former offer of settlement, he would have been bound by his solicitors' acts closing the prior negotiations upon the 20th of October, although he had forbidden his solicitors to continue them, so long as the opposite party, that is, neither the plaintiff nor her solicitors, had notice that their former negotiations had been put an end to.

But here the plaintiff had notice that the former proposals were, (as I am assuming,) withdrawn, and a new proposal substituted for it. If that notice had been given to her solicitors the previous negotiations would have been terminated, and there is no reason why the like result should not follow when the one principal has direct notice from the other principal that such former proposals were put an end to.

If the principals themselves had come to terms their agreement would determine the power of their agents to act any longer. But what would be the case if, before the principals agreed, their solicitors had concluded a bargain between themselves, without notice of what their clients had done? Both agreements could not stand. The principals, no doubt, could recognize either of the contracts, but if they did not both consent to the one agreement being the binding one, which of them would be binding, for one of them would certainly be binding? I should say the agreement made by the agents, simply because it was prior in time, and was made by and under the full authority of their principals.

Upon that reasoning I am of opinion that when the two principals negotiate or contract, and either perfect a contract or put an end to proposals for one before the delegated power to their agents has been fully exercised, the acts of the principals are the binding acts, and the subsequent acts of the agents are of no avail as against their principals.

What the effect of such later act of the agents would have upon the rights or interests of the principals if money were paid over, or property given up, or the like, to a third person in ignorance of what the principals had done it is needless to speculate, for nothing of the kind has taken place here.

The conclusion I come to upon this point is, that the letter of the defendant of the 19th of October to the plaintiff, received by her before any final arrangement had been made by the solicitors would, if the letter had been an abandonment of the prior proposals for a settlement, have put an end to them, although their respective solicitors had no knowledge of such a communication.

But as I have said before, I think that letter was not a plain abandonment of the former proposals, nor a withdrawal from the defendant's solicitor of the power theretofore conferred upon him, to conclude a bargain upon the basis of the terms then and theretofore in treaty between them.

The result of my decision is, that the plaintiff is entitled to have the contract for the conveyance of the land specifically performed. I do not feel disposed to award any damages against the defendant, but I direct that he shall pay the costs of this action.

On September 15th, 1883, the defendant moved by way of appeal to the Divisional Court, before Boyd, C., and Proudfoot, J.

Seton Gordon, for the appellant, cited *Besant v. Wood*, L. R. 12 Chy. D. 606; *Fry* on Specific Performance, 2nd ed., sec. 259; *Cahill v. Martin*, 7 L. R. Ch. 361.

G. T. Blackstock, for the respondent was not called on.

THE COURT dismissed the appeal, with costs.

A. H. F. L.

[CHANCERY DIVISION.]

KITCHING V. HICKS ET AL.

Chattel mortgage—Assignment of existing chattels and book debts—Necessity for registration—Contract illegal as to part only—Book debts—Charge on future acquired chattels—Adequate description—Locus standi—Assignee for creditors—Creditors other than judgment creditors.

K. having become security for repayment by H. of \$600, an agreement in writing was entered into that in consideration thereof, H. did assign to K. "all his right and claim to the goods and stock-in-trade in the store of H. to an amount sufficient to re-imburse K., whatever he may pay in consequence of becoming such surety as aforesaid, and should there not be stock enough for that purpose in the store at such time, the balance after deducting the value of the said stock, shall be made up of the book debts, then on the books of H."

This agreement was not registered. H. subsequently made an assignment for the benefit of his creditors to C., at which time only about \$20 worth of the stock was the same as had been in the store at the time of the said agreement, and K.'s administratrix now brought this action against H. for repayment, and in default, for payment by C. out of the proceeds of the stock and book debts of H. (C. as well as H. F. & Co., creditors of H. who had executed the assignment to C. being made parties defendant with H.)

Held, reversing the decision of Proudfoot, J., that, so far as the book debts were concerned as to which registration was unnecessary, the agreement was valid and binding as against the creditors as well as H. *Taylor v. Whittemore*, 10 U. C. R. 440, cited and approved of; *Short v. Ruttan*, 12 U. C. R. 79, not followed.

The rule now is, that if the legal part of the contract in question can be severed from that which is illegal, the former shall stand good whether the illegality exist by statute or common law.

Quære whether registration is necessary to support as against creditors an instrument by which a charge upon future acquired chattels is created.

Held, also, affirming the decision of Proudfoot, J., that though an assignee for the benefit of creditors could not take advantage of the want of registration, yet creditors themselves might, although not creditors by judgment and execution at the time of the assignment: and following *Parke v. St. George*, 2 O. R. 342, and *Meriden Silver Co., v. Lee*, 2 O. R. 45, that the assignment did not prevent them from impeaching it.

Held, further, that the terms of the agreement were not sufficiently comprehensive to cover the substituted, renewed, or added stock in trade.

THIS action was brought by Eliza Kitching against James B. Hicks and Edward R. C. Clarkson, as original defendants, and Houston Foster & Co. added as parties in chambers, to recover payment of certain moneys alleged to be due to her under the circumstances set out in the judgments of Proudfoot, J., and Osler, J. A.

The action was tried at London on June 13th, 1883, before Proudfoot, J.

Magee, for the plaintiff. The security given was clearly intended as a continuing security. Security may be given on after-acquired goods. The agreement is good whether registered or not as against the defendant *Clarkson: Lumsden v. Scott*, 19 C. L. J. 78; *Parkes v. St. George*, 2 O. R. 342. As to the verbal arrangement that other notes should be secured in the same way, I refer to *Churcher v. Johnson*, 34 U. C. R. 528. As to the defendants *Houston. Foster & Co.*, the only creditors who can attack a chattel mortgage are execution creditors: *Parkes v. St. George*, 2 O. R. 342, now in the Court of Appeal (a); *re Burrett*, 5 A. R. 206; *Holmes v. VanCamp*, 10 U. C. R. 501; *Richard v. James*, L. R. 2 Q. B. 285; *Edwards v. English*, 7 E. & B. 564; *Nicholson v. Cooper*, 3 H. & N. 384. But it is not necessary to register a bill of sale passing after-acquired goods: *Baldwin v. Benjamin*, 16 U. C. R. 52; *Fraser v. Gladstone*, 11 U. C. R. 125; *Mathers v. Lynch*, 28 U. C. R. 354; *Walker v. Niles*, 18 Gr. 210. When it is impossible to take possession the statute does not apply: *Burton v. Bellhouse*, 20 U. C. R. 60. It was impossible to take possession of the book debts. I refer also to *Olmsted v. Smith*, 15 U. C. R. 421; *Taylor v. Flood*, 10 U. C. R. 458; *re Knott*, L. R. 7 Ch. D. 549; R. S. O. c. 119, sec. 1. As to costs, we are entitled to them at all events up to the time that *Houston & Co.* were added. *Hicks* is, in any event, liable for costs.

Akers, for *Houston & Co.* The assignee is not bound by a chattel mortgage which has not been registered: R. S. O. c. 119, secs. 4, 6; *McLean v. Pinkerton*, 7 A. R. 490; *Turner v. Mills*, 11 C. P. 366; *Valentine v. Smith*, 9 C. P. 59; *Clark v. Bates*, 21 C. P. 348; *Mathers v. Lynch*, 28 U. C. R. 354. *Ontario Bank v. Wilcox*, 43 U. C. R. 460, has been overruled. Neither *Baldwin v. Benjamin*, 16 U. C. R. 52, nor *Churcher v. Johnson*, 34 U. C. R. 528, apply. The agreement is certainly void as against us. At any rate it can only apply to the one note of \$600.

(a) Since argued before the Court of Appeal, and judgment reserved.

But it was broken by the refusal to renew as agreed. Moreover the book debts are not sufficiently described in it. I refer to *Parkes v. St. George*, 2 O. R. 342; *Longeway v. Mitchell*, 17 Gr. 190; *Barker v. Leeson*, 1 O. R. 114; *Kitching v. Hicks*, 19 C. L. J. 59; *re Coleman*, 36 U. C. R. 559; *Bank of Montreal v. McWhirter*, 17 C. P. 506; *Meriden Silver Co. v. Lee*, 2 O. R. 451; *Boynnton v. Boyd*, 12 C. P. 334; *re Anderson*, 2 A. R. 24; *re Barrett*, 16 C. L. J. N. S. 144, S. C. 5 A. R. 215; *Noell v. Pell*, 7 C. L. J. 322; *Heward v. Mitchell*, 11 U. C. R. 625; R. S. O. c. 116.

Meredith, Q. C., for the defendant Hicks, referred to *Richards v. James*, L. R. 2 Q. B. 285; *McMillan v. McSherry*, 15 Gr. 133; *Short v. Ruttan*, 12 U. C. R. 79; *Kelsey v. Rodgers*, 32 C. P. 624.

Magee, in reply. In *McMillan v. McSherry*, the goods were in existence. There is nothing in R. S. O. ch. 119, sec. 6, to invalidate the mortgage. Sec. 4 of that Act does not refer to sec. 6.

July 6th, 1883. PROUDFOOT, J.—On April 19th, 1881 the defendant, James B. Hicks, a merchant tailor in London, applied to John Kitching for a loan of \$600, to be employed in his business; Kitching had not the money at hand, but gave his promissory note for \$600 to enable Hicks to get the money by discounting it at the Molsons Bank. On the same day, and as a part of the same transaction, a memorandum of agreement was drawn by Hicks's solicitor, and signed by the parties, which recited that Kitching had become surety to the Molsons Bank for Hicks for \$600; and then witnessed that for and in consideration of the premises Hicks did assign unto Kitching all his rights and claims to the goods and stock in trade in Hicks's store to an amount sufficient to reimburse Kitching whatever money he might pay in consequence of becoming such surety, together with ten per cent. interest on the same; and should there not be stock enough for that purpose in the store at such time, the balance, after

deducting the value of said stock, should be made up of the book debts then on the books of Hicks. The agreement was to terminate at the end of one year from the date; but should Hicks become insolvent at any time before the expiration of that term then the agreement should become null and void, and Kitching should be at once released from the same.

This agreement was not registered, and Kitching did not take possession of any of the goods.

On May 30th, 1882, an endorsement was made upon that agreement and signed by the parties, as follows: "We hereby agree to renew the within agreement for the term of one year upon the terms and conditions therein expressed."

The note for \$600 was renewed in the same form and for the same amount, on July 22nd and October 24th, 1881, and on January 27th, April 30th, and August 1st, 1882, for the sum of \$500.

Kitching died on September 28th, 1882. When the last renewal was about falling due, Hicks applied to the plaintiff, the widow and administratrix of Kitching, to renew it, which she declined to do.

On September 20th, 1881, Kitching made another note for the accommodation of Hicks for \$250, payable at the Mahon Banking Co.'s office, which Hicks discounted there, which was twice renewed for the same amount, and ultimately, on June 30th, 1882, for \$150.

On September 5th, 1882, Kitching made another note for \$95 for Hicks's accommodation and it was discounted by him at the Molson's Bank.

The plaintiff alleges that it was mutually agreed between Hicks and Kitching that the notes for \$250 and \$95 should be secured in the same way as the note for \$600. This is denied by Hicks on his examination, and the proof on the part of the plaintiff is confined to some rather vague expressions of Hicks to her and another witness that she was secured for the whole. I do not think it sufficiently established that there was such an agreement.

The Molsons Bank recovered judgment against Hicks on December 9th, 1882, upon the \$500 note and the \$95 note for \$633.11. (b) The plaintiff paid this sum to the Molson's Bank on December 20th and took an assignment of the judgment, which bears date December 27th.

The plaintiff also, on December 20th, paid to the Mahon Banking Co. \$153.15, the amount due on the note for \$150.

On November 28th, 1882, Hicks made an assignment of his stock in trade, book debts, and household furniture to the defendant Clarkson in trust for the benefit of his creditors, which was executed by several creditors and, among others, by Houston, Foster & Co., who have been added as parties to the action. This assignment was duly registered on November 29th (c).

The defendant Hicks says the plaintiff refused to renew the notes, and that this was a breach of the agreement of April 19th, 1881: but as I conclude from the evidence given before me that when he applied for the renewal he was, in fact, in insolvent circumstances, and within two months afterward made the assignment reciting his insolvency, I think there was no breach of the agreement by the plaintiff, and that she was not bound to continue her liability for Hicks's benefit under its terms.

Houston, Foster & Co. rely upon the assignment to Clarkson, and that Clarkson had no notice of the agreement of April 19th, 1881, till long after the assignment: that the agreement was void for want of registry: that the plaintiff has filed her claim with Clarkson for the full amount of her claim against Hicks: that they have been creditors of Hicks since March, 1881, and are still his creditors, and on March 2nd, 1883, recovered judgment against

(b) On December 11th, 1882, the bank placed writs of execution in the sheriff's hands.

(c) In the present action the plaintiff claimed payment by the defendant Hicks of the said sums paid by the plaintiff, with interest, and, in default thereof, payment thereof by the defendant Clarkson out of the moneys received by him for the said stock and book debts; and general relief.

Hicks for \$2,094.52, and have a claim beyond that for \$625.56.

It appeared in evidence that, at the time of the assignment in November, 1882, there was not more than \$20 worth of stock that had been in the store in April, 1881.

The agreement of April 19th, 1881, covered the goods then in the store, and goods that might be in the store, and the debts that might be in the books when Kitching should pay the money for which he was security. The clause as to the agreement terminating on the insolvency of Hicks is plainly for the benefit of Kitching, and it was to terminate so far as it imposed any liability on him to continue the accommodation—he was to be at once released from it. As against Hicks, therefore, I think the plaintiff entitled to judgment.

As regards creditors, the statute requires mortgages not accompanied by actual delivery of the goods and chattels to be registered. It is true that if the goods and chattels were of such a nature that possession could not be given, as in *Burton v. Bellhouse*, 20 Q. B. 60, where unfinished locomotives were in question, and in *Harris v. Commercial Bank*, 16 Q. B. 437, where part of the goods were lying in the customs warehouse subject to duties, and therefore it would seem that a mortgage of future goods, and so incapable of present delivery, would not be within the statute.

But it has been held in *Short v. Ruttan*, 12 Gr. 79, that where the security covers goods and chattels of which possession might be given, as well as future goods, it must be registered: for by the statute it is made absolutely void, and it could not be upheld as to the other part, of which possession could not, in the nature of things, have been changed at the time of making the deed. And this case has been recognized in *Kelsey v. Rogers*, 32 C. P. 624. There are others to the same effect.

The agreement in this case was for a present advance, not for a future one, and came therefore within the Act.

The judgment obtained by the Molsons Bank was not got till some days after the assignment for creditors; so

that the plaintiff can claim no priority by reason of the assignment of it to her, and must rest her title to priority upon the agreement.

Then, are the defendants, the assignee for creditors, or Houston & Co., the creditors, in a position to take advantage of the want of registry? I am inclined to adopt the view of the Chancellor in *Parkes v. St. George*, 2 O. R. 342, that the assignee for creditors could not attack this mortgage as representing creditors, although an assignee in insolvency might do so; and, following the decision in that case, I think that Houston & Co., though not creditors by judgment and execution at the time of the assignment (though they have since got both judgment and execution), have the right to attack the agreement. And the agreement being void, on the ground I have mentioned, the effect of setting it aside will be to let the goods affected by it fall into the assignment for the benefit of creditors, and this is what Houston & Co. ask.

The plaintiff has judgment against Hicks assigned by the Molsons Bank, and she is entitled to judgment also for the \$150 note against him; but she is only entitled to prove against his estate in the hands of the assignee on the same terms as his other creditors.

The plaintiff is entitled to costs against Hicks.

Judgment is given for the defendants Houston & Co., asking the Court to declare the agreement with Kitching void for want of registry, and that she be prevented from interfering with the goods assigned to the assignee for creditors, with costs; and the claim of the plaintiff is dismissed as against Houston & Co. (d).

(d) Previously to the trial of this action, on January 23rd, 1883, the plaintiff, having first obtained an interim injunction, moved to continue the same, and that the defendant Edward R. C. Clarkson, his solicitor and agents, might be restrained from paying over to the defendant Hicks, or to any person or persons other than the plaintiff, or from parting with the proceeds of the sale of the goods, stock in trade, and book accounts of the defendant James B. Hicks, which had been sold by the defendant Clarkson, on December 21st, 1882, to the extent of \$300, until the trial of this action.

Afterwards the plaintiff moved by way of appeal before the Divisional Court.

The motion was heard on December 7th, 1883.

Magee, for the appellant. The agreement was not within the Chattel Mortgage Act: *Holroyd v. Marshall*, 10 H. L. Cas. 191, 9 Jur. N. S. 213; *Burton v. Bellhouse*, 20 U. C. R. 60; *Brown v. Bateman*, L. R. 2 C. P. 272; *Blake v. Tiver*, 16 U. C. R. 108; *Ex parte Newitt*, 16 Ch. D. 522. The after-acquired goods were not deliverable or assignable. They were not in existence. The English Act is even wider than our own. See *Reeves v. Barlow*, 11 Q. B. D. 610; *Brown v. Bateman*, *supra*; *Ex parte Newitt*, *supra*. The agreement amounted to a good assignment of the book debts at all events: *Holroyd v. Marshall*, *supra*. Have Foster & Co., as creditors, a *locus standi* to avoid the agreement, and reach it over the assignment to Clarkson, if it was good as against that? We contend not, for the assignment is good as against them, and as against the assignee Clarkson the plaintiff is entitled to judgment. If,

*N. Hoyle*s for the plaintiff.

J. Akers for the defendant Clarkson.

On January 24th, 1883, BOYD, C., gave judgment as follows :

In the present state of the law the safest course to adopt on the present application is to continue the injunction till the hearing. It is evident that the views of Draper, C. J., in *Boynston v. Boyd*, 12 C. P. 334, though not essential to the disposition of that case, are at variance with the views expressed in *Re Coleman*, 36 U. C. R. 559, in which the earlier case does not appear to have been cited. If it be that the *dicta* of Draper, C. J., are law, then the agreement to hold the goods as security in this case, not being registered, would be invalid as against the subsequent assignment for the benefit of creditors. But if not, then, in another aspect of the case (which is not at present presented), it may be that the privilege claimed by the plaintiff cannot be enforced as against any of the creditors of Hicks intervening in that character, as I held in *Parke v. St. George*, 2 O. R. 342. As against a voluntary assignee, it may be that the plaintiff can succeed; as against a creditor prejudiced by the unregistered agreement, it may be that the plaintiff will fail. But this aspect of the case is not at present before the Court, so that I content myself with holding the fund *in medio*, that the rights of all parties may be better disposed of at the hearing. Costs of the motion will be reserved till then.

however, the agreement is void, then our execution comes before those of any of the other creditors. See also, *Ex parte Blaiberg*, 23 Ch. D. 254; *Ex parte Toomey*, *ib.* 254; *Stuart v. Tremaine*, 2 C. L. T. 540; *Re Artistic Colour Printing Co.*, 21 Ch. D. 510.

Akers, contra. The agreement is within the Chattel Mortgage Act. It does not cover future acquired stock; it only provides that if the existing stock should not be enough, then the book debts should be added. Assume that the document in question did require registration, and was therefore void as against creditors, it would nevertheless not be void against the voluntary assignee for creditors. But when the creditors become parties to the suit in order to attack the agreement, can the plaintiff say, you cannot get over the assignment to the assignee for creditors, which is a shield against you and a sword for me? As to this part of the case I refer to *Taylor v. Flood*, 10 U. C. R. 458; *McLean v. Pinkerton*, 7 A. R. 490; *Heward v. Mitchell*, 11 U. R. C. 625; *Noell v. Pell*, 7 C. L. J. O. S. 322; *Kelsey v. Rogers*, 32 C. P. 624; *Short v. Ruttan*, 12 U. C. R. 79; *Boynton v. Boyd*, 12 C. P. 334. As to the book debts, there are no words sufficient to pass them.

Magee, in reply, referred to *Reeve v. Whitmore*, 33 L. J. Ch. 63; S. C., 9 Jur. N. S. 243; *Snider v. Bird*, L. R. 9 C. P. 64; *Ramsden v. Lupton*, L. R. 9 Q. B. 19; *McMaster v. Garland*, 8 A. R. 1.

February 21st, 1884. OSLER, J. A.—Rehearing by the plaintiff of decree of Proudfoot, J., made on the trial of the action at London.

The plaintiff is the widow and administratrix of John Kitching, who in April, 1881, endorsed a note of \$600 for the accommodation of the defendant Hicks.

To secure him against loss in respect of this endorsement an agreement was made in the following terms:

“Memorandum of agreement entered into this 19th day of April, 1881, between Hicks of the first part and Kitching

of the second part. Whereas the party of the second part has become surety to the Molsons Bank for the party of the first part for the amount of \$600. Now this agreement witnesseth, that in consideration of the premises the party of the first part *doth assign unto* the party of the second part all his right and claim *to the goods and stock in trade in the store* of the said party of the first part to an amount sufficient to reimburse to said party of the second part *whatever he may pay in consequence* of becoming such surety as aforesaid, * * and should there not be stock enough for that purpose in the store *at such time*, the balance, after deducting the value of the said stock, shall be made up of the book debts then on the books of the said party of the first part. This agreement is to terminate at the end of one year from the day of the date hereof."

The note mentioned in the agreement was renewed several times and reduced to \$500, and on May 1st, 1882, an endorsement was made on the agreement and signed by the parties in these terms: "We hereby agree to renew the within agreement for the term of one year, upon the terms and conditions therein expressed."

Neither the agreement nor the extension was filed in the office of the clerk of the County Court under the Chattel Mortgage Act.

On November 28th, 1882, Hicks made an assignment of all his property for the benefit of his creditors generally, to the defendant Clarkson, which was duly filed. It was executed by certain of his creditors, among others by the defendants Houston, Foster & Co., who were creditors at the date of the original agreement between Kitching and Hicks. Shortly thereafter the plaintiff paid the judgment which had been obtained against Hicks on the note, and claimed as against the assignee the stock in trade and book debts under the agreement. Of the stock in trade in existence at the date of the agreement not more than twenty dollars' worth came into the hands of the assignee. The defendants Houston, Foster & Co., were added parties defendants to this action in order to impeach the agree-

ment if it should appear that the defendant Clarkson had not the right to do so; and upon their counter claim as suing on behalf of themselves and all other creditors of the defendant Hicks, it has been held to be entirely void for want of registration, with the result that the property is decreed to fall into the assignment for the benefit of creditors generally.

The plaintiff contends as against Clarkson it was not necessary that the agreement should have been registered, and I think she is right, Clarkson had no more right to object to its non-registration than the assignor himself would have had. The assignee is merely the legal representative of the debtor with such right as he would have had if not bankrupt, and no other: *In re Mapleback*, 4 Ch. D. 150; *Ex parte Newitt*, 16 Ch. D. 531; *Harris v. Tremain*, 7 Q. B. D. 340; *re De Epineuil*, 20 Ch. D. 217; *Collver v. Shaw*, 19 Gr. 599; *Re Coleman*, 36 U. C. R. 559. The cases of *Re Barrett*, 5 A. R. 206, and *Re Andrews*, 2 A. R. 24, were decided upon the peculiar language of our late Insolvent Act, and do not affect the general rule. Nor is *Boynton v. Boyd*, 12 C. P. 334, cited by Mr. Akers, a decision to the contrary, although no doubt Draper, C. J., in that case says that his impression is that the assignees would take as against the chattel mortgage if not filed or renewed.

Then what are the rights of the creditors Foster & Co., who by their counter-claim on behalf of themselves and other creditors of the assignor, insist that the agreement is void for want of registration. If it is a mortgage, or a conveyance intended to operate as a mortgage, and I suppose that is how it should be looked at, the statute declares that it shall be absolutely null and void *as against creditors* of the mortgagee and against subsequent purchasers in good faith and for valuable consideration. But the plaintiff says that even if the agreement is void as against these creditors, the assignment to Clarkson, valid as against them, is interposed and prevents them from enforcing any individual or class rights which they might otherwise have

the after-acquired property would not have been put on this ground if the case of *Holroyd v. Marshall*, 10 H. L. Cas. 191, had then been decided.

The Court, however, express the opinion, entitled to the greatest respect, that as to the timber to be afterwards manufactured, and of which, in the nature of things, possession could not have been changed, the deed could not be upheld because it was, in consequence of its non-registration, made absolutely void by the statute. "It is a statute that makes this void and not merely a principle of the common law; and it is a maxim that in such cases the deed must be taken to be altogether void, and not merely as to that part to which the objection to its illegality applies." Later authorities, however, shew that this rule has been relaxed in modern times, and that if the legal part of the contract can be severed from that which is illegal, the former shall stand good whether the illegality exist by statute or at common law. The old rule was that embodied in the quaint saying of Lord Hobart, "the statute is like a tyrant, where he comes he makes all void, but the common law is like a nursing father, makes void only that part where the fault is, and preserves the rest." *Norton v. Simmes*, Hobart 14. (*d.*)

In *Pickering v. Ilfracombe R.W. Co.*, L. R. 3 C. P., at p. 250, Mr. Justice Willes, after quoting Lord Hobart, as above, says: "The distinction now applies only where the statute makes the deed void altogether. The general rule is, that where you cannot sever the illegal from the legal part of a covenant, the contract is altogether void, but where you can sever them, whether the illegality be created by the statute or by the common law, you may reject the bad part, and retain the good." See also *Payne v. Mayor of Brecon*, 3 H. & N. 572. In *Kerrison v. Cole*, 8 East 231, it was held that although the Act 26 Geo. III. ch. 69 sec. 17, required that upon the sale of a ship the certificate of registry should be recited

(*d.*) See per Twisden, J., *Maleverer v. Redshaw*, 1 Mod. 35.

in the bill of sale, "otherwise such bill of sale should be utterly null and void to all intents and purposes," yet a covenant for repayment of the mortgage money, in a mortgage of a vessel void under that statute, was good. See also *Wharton* on Contracts, sec. 338. In *Maxwell* on Statutes, 2nd ed., pp. 491, 492, it is said that whether the illegality be created by the statute or the common law, "the question, whether the whole instrument or only the invalid part is void, depends on the more rational ground whether the invalid part be severable from the rest or not." The Act here does not declare that the instrument shall be altogether void, but only that the mortgage, or conveyance, or sale shall be void *as against creditors*. Therefore, apart from the existence of actual fraud, it appears to me that we are at liberty to hold that the instrument is only avoided by the non-registry in so far as the Act required its registration, if that part of it can be severed from the rest, as in the case before us it unquestionably can.

The assignment or charge of the book debts is separable from the assignment of the goods, and as to its registry was not necessary. It is not different in principle, as it seems to me, from the covenant in the void mortgage upon the ship in *Ferrison v. Cole*. Can we doubt that in that case if the instrument had contained a charge or security upon chattels in addition to the mortgage on the ship, the former would have been held valid upon the same reasoning on which the covenant was supported?

Since writing the foregoing I find I have overlooked the case of *Taylor v. Whittemore*, 10 U. C. R. 440, which is strongly in the plaintiff's favour on this point. The question there arose upon an assignment of all the debtor's real and personal estate, including choses in action, for the benefit of his creditors. The assignment had not been properly registered, but there had been an actual and continued change of possession of the greater part of the goods and chattels. The judgment of the Court was delivered by Burns, J., who at p. 454, in dealing with the objection that by reason of its non-registration the deed was

avoided as to the property of which actual possession had been thus taken said, "The deed in this case assigns all Mountjoy's debts and choses in action as well as choses in possession, and though it may be void as respects the choses in possession, I see no reason for saying that the deed is inoperative to pass all claim which Mountjoy had in his choses in action though the transfer of these be included in what may be void." Then he concludes that the deed could not be avoided as to the real estate conveyed by it, nor as to the goods of which possession had been changed.

In *Olmstead v. Smith*, 15 U. C. R. 421, and *Carscallen v. Moodie*, *ib.* 92, as well as in *Ruttan v. Short*, already cited, Robinson, C. J., evidently leans to the view that the deed would be altogether void, but the case of *Taylor v. Whittemore* is not noticed.

On the whole, therefore, I am of opinion that the plaintiff is entitled to a decree in her favour as to the book debts, and to this extent the decree should be varied.

FERGUSON, J.—I concur. I understand from my brother Proudfoot that he was in some degree misled by his interpretation of a case, and that his opinion now is not altogether against our present judgment.

A. H. F. L.

A DIGEST
OF
ALL THE CASES REPORTED IN
BEING DECISIONS IN THE
QUEEN'S BENCH, COMMON PLEAS
DIVISIONS.
OF THE
HIGH COURT OF JUSTICE FOR

<p style="text-align: center;">ABANDONMENT. <i>Of goods seized by sheriff.]—See</i> INTERPLEADER.</p>	<p style="text-align: right;">A <i>After re</i> INDIANS.</p>
<p style="text-align: center;">ACQUIESCENCE. <i>See</i> CORPORATIONS, 2 — PRACTICE — WATER AND WATERCOURSES, 1.</p>	<p style="text-align: right;"><i>By-law:</i> — <i>See</i> MU</p>
<p style="text-align: center;">ACTION. <i>Of seduction. Right to maintain.]</i> — <i>See</i> SEDUCTION.</p>	<p style="text-align: right;"><i>From</i> <i>Stay of</i> TION.</p>
<p style="text-align: center;">ALIENATION. <i>Restraint on.]—See</i> WILL, 2, 5.</p>	<p style="text-align: right;">ARBITR. 1. <i>Rail</i> <i>ation—Au</i></p>
<p style="text-align: center;">ALIMONY. <i>See</i> HUSBAND AND WIFE, 3.</p>	

possible damage by felling trees—Mode of estimating compensation—Damages—Sufficiency of Notice.—The right of a railway company to cut down trees for six rods on each side of the railway under the Consolidated Railway Act 1879, sec. 7, sub-sec. 14, is entirely distinct from their right to expropriate land for the road. If compensation can be claimed for it, it must be distinctly demanded by the notice.

Held, therefore, that an award was bad in allowing compensation to the owner of lands expropriated for the damage that might accrue to the owner by the possible exercise of such right.

Quære, whether under the Consolidated Railway Act, 1879, more than the value of the land actually taken can be allowed, as the Act does not contain a section equivalent to sec. 7 of R. S. O. ch. 165, and sec. 5 of C. S. C. ch. 66, giving compensation for damages to lands injuriously affected.

Semble, that where a parcel of land is severed by the railway the actual value is the difference between the value of the land of which it forms part before the expropriation, and the value to the owner of the remainder after the expropriation.

Held, that the possible damages to bush land from greater exposure to winds and storms, and the greater liability to injury by fire, by reason of the working of the railway, were contingencies too remote to be considered in estimating the amount of compensation where there were no buildings to be endangered.

The notice by the railway company included compensation "for such damages as you may sustain by reason or in consequence of the powers above mentioned."

Held, sufficient to allow the arbitrators to award damages resulting to the owner from the expropriation. *Re Ontario and Quebec R. W. Co. and Taylor*, 338.

2. *Award—Arbitrators*—42 Vic. ch. 9, D.]—On an arbitration with regard to land taken by a railway company, the argument closed on the 10th of August, and the arbitrators adjourned until the 11th, when, after discussion, one of them said he was sorry he could not concur with the others in the sum which they had agreed upon, and withdrew. The other two then signed the award in presence of each other, and reacknowledged it in presence of a witness on the 14th of August.

Held, that the meeting having been adjourned to the 11th the case was within the terms of 42 Vic. ch. 9, sec. 9, sub-sec. 17, D.

Held, also, after reviewing the authorities, that the award was valid at common law. *Freeman v. Ontario and Quebec R. W. Co.*, 413.

Time for making award—Interest of arbitrator—Setting aside award.]
—See PRACTICE.

See MUNICIPAL CORPORATIONS, 3.

ARREST.

See MALICIOUS ARREST.

ASSESSMENT AND TAXES.

Assessment of two parcels of land together—Sale for taxes under such assessment—R. S. O. ch. 180.—A. & H. were the respective owners of the north and centre parts of a certain lot, which were both occupied by H. until the year 1871, when the

buildings were burned, and H. went out of possession. He subsequently paid the taxes up to 1873, when he left the neighbourhood, and did not return until 1883, and then found that his part and that of A.'s had been sold for taxes, but he had received no notice of any taxes being in arrear. In an action by H. and his wife, who had subsequently acquired his title, it appeared that both pieces had been assessed separately in 1872, together in 1873, were not assessed at all in 1874, were assessed together as the "north half of lot 13, one-tenth of an acre" in 1875, together as the "north part of lot 13" in 1876, in one parcel as "north part 13" in 1877, and that they had been sold for the taxes due on both parcels down to 1877, and for those on the north piece for 1878.

Held, that the tax sale was invalid and could not be sustained, and that the plaintiffs were entitled to recover possession. *Hill v. Macaulay*, 251.

Alteration of — Evidence.]— *See DRAINAGE.*

See SURRENDER.

ASSIGNMENT.

For creditors.]— *See BANKRUPTCY AND INSOLVENCY — TRUSTS AND TRUSTEES.*

Of those in action.]— *See BANKRUPTCY AND INSOLVENCY*, 5.

See CONTRACT.

ATTACHMENT.

See INTERPLEADER.

ATTORNMENT.

From plaintiff's tenant.]— *See ESTOPPEL.*

AWARD.

See ARBITRATION AND AWARD.

BANKRUPTCY AND INSOLVENCY.

1. *Fraudulent preference—Pressure—Originator of scheme of preference*—*R. S. O. c. 118.*]—L., being in insolvent circumstances, went to A., and asked A. to procure discounts for him, which A. agreed to do on condition that he should retain a part of the proceeds of the paper which should be brought to him, and apply it to the indebtedness of L. to him, and to several other creditors, whom he, A., represented. This was agreed to and acted on, and certain securities were thus transferred to A. by L., L. also, at the same time, requested A. to sell some leather for him, which A. agreed to do on similar terms as to the application of the proceeds, and the leather was duly transferred to A., who was aware of L.'s circumstances.

On action being brought impeaching the transfer of the securities as a fraudulent preference.

Held, that inasmuch as the idea of the transfer as made was proposed by A., and he, and not L., was the originator of the scheme, whereby he, and the creditors represented by him were preferred, the transfers were not made "voluntarily," and "with intent" to give such creditors a preference over the other creditors within the meaning of the statute, and could not be set aside. *Whitney v. Toby et al.*, 54.

1. *Insolvency—Bond of official assignee—Official assignee subsequently made creditors' assignee—Principal and surety—Insolvent Act of 1875—38 Vic. ch. 16, D., secs. 28, 29.]—Held*, that where an official assignee in insolvency had given a bond as such with sureties, pursuant to the Insolvent Act of 1875, and amending Acts, and the creditors had duly appointed the same individual to be creditors' assignee, under section 29 of that Act, but had not required him to give security as such creditors' assignee, the sureties under the bond given by him as official assignee remained liable for his dealings with the estate, and were not discharged by reason of such appointment as creditors' assignee.

Semble, that one who brings an action against an official assignee in insolvency for default in dealing with a certain estate, upon his bond given as security against such defaults, is not bound to ascertain if the assignee is in default as to other estates; and the sureties to the bond are discharged by payment to any one who recovers judgment against them. *Armstrong v. Foster et al.*, 129.

3. *Assignment for the benefit of creditors—Notice of claims—Liability after estate divided—R. S. O. ch. 107, sec. 34—46 Vic. ch. 9, O.]—H.* A. B., being unable to pay his creditors in full, made an assignment to E. F. B. for their benefit. E. F. B. advertized in the *Ontario Gazette* and a local paper, under R. S. O. ch. 107, as amended by 46 Vic. ch. 9, O., for all creditors to send in their claims and by his clerk C. E. B. sent notices to each creditor from a list furnished by the assignor to said C. E. B., which list he said must have contained the names of the plaintiffs and C. & Co., who had assigned a claim

they had to the plaintiffs. No claim was sent in under the notice by either the plaintiffs or C. & Co., and the defendant distributed the estate without regard to the plaintiffs or C. & Co.

At the trial it appeared that E. F. B. had H. A. B.'s books, in which there was a credit to the plaintiffs and C. & Co.; that H. A. B. told him before he divided the estate that C. & Co. had sued him, and on the day of the division he received a letter from plaintiffs' solicitor notifying him. No proof was given of the posting of the individual notices to either plaintiffs or C. & Co.

Held, that the defendant had notice of the plaintiffs' claim, and that he was liable to the plaintiffs for their and C. & Co.'s proper dividend on the estate.

A trustee is not exonerated by the Act if he had actual notice of the claim before distribution, even though he may have sent the notice prescribed, and received no response to it. *Carling Brewing and Malting Co. v. Black*, 441.

4. *Execution—Partnership and separate creditors—Joint estate to joint debts, separate estate to separate debts—Judicature Act 1881, sec. 17, sub s. 10.]—L.* having a judgment against a firm of R. & Co., which was in insolvent circumstances, issued execution and directed the sheriff to levy the amount on the separate goods of R., a member of the firm. The plaintiffs having recovered judgment in respect of a certain debt for which, not only R. & Co., but also R. individually was liable, subsequently issued and placed writs in the sheriff's hands, and also directed him to levy the amount on the goods of R. The Sheriff sold R.'s goods and applied the proceeds first upon L.'s execution, after re-

serving notice from the plaintiffs that they claimed the proceeds of R.'s separate property as applicable first to their writ, inasmuch as their judgment embraced the separate liability of R. The plaintiffs then brought this action against the sheriff for a false return.

Held, that the plaintiffs were entitled to judgment, for the rule of the administration of assets in equity (which was also the rule in bankruptcy and insolvency) should be followed here, and the joint estate applied in the first instance to the joint debts, and the separate to the separate debts; and this equitable rule must prevail over the legal lien acquired by L. by his execution. *Bank of Toronto v. Hall et al.*, 644.

5. *Chattel mortgage—Assignment of existing chattels and book debts—Necessity for registration—Contract illegal as to part only—Book debts—Charge on future acquired chattels—Adequate description—Locus standi—Assignee for creditors—Creditors other than judgment creditors.*—K. having become security for repayment by H. of \$600, an agreement in writing was entered into that in consideration thereof, H. did assign to K. "all his right and claim to the goods and stock-in-trade in the store of H. to an amount sufficient to reimburse K. whatever he may pay in consequence of becoming such surety as aforesaid, and should there not be stock enough for that purpose in the store at such time, the balance, after deducting the value of the said stock, shall be made up of the book debts, then on the books of H."

This agreement was not registered. H. subsequently made an assignment for the benefit of his creditors to C., at which time only about \$20 worth of the stock was the same as had been

in the store at the time of the said agreement, and K.'s administratrix now brought this action against H. for repayment, and in default, for payment by C. out of the proceeds of the stock and book debts of H. (C. as well as H. F. & Co., creditors of H. who had executed the assignment to C., being made parties defendant with H.)

Held, reversing the decision of Proudfoot, J., that, so far as the book debts were concerned as to which registration was unnecessary, the agreement was valid and binding as against the creditors as well as H. *Taylor v. Whittemore*, 10 U. C. R. 440, cited and approved of; *Short v. Ruttan*, 12 U. C. R. 79, not followed.

The rule now is, that if the legal part of the contract in question can be severed from that which is illegal, the former shall stand good whether the illegality exist by statute or common law.

Quere, whether registration is necessary to support as against creditors an instrument by which a charge upon future acquired chattels is created.

Held, also, affirming the decision of Proudfoot, J., that though an assignee for the benefit of creditors could not take advantage of the want of registration, yet creditors themselves might, although not creditors by judgment and execution at the time of the assignment: and following *Parkes v. St. George*, 2 O. R. 342, and *Meriden Silver Co. v. Lee*, 2 O. R. 45, that the assignment did not prevent them from impeaching it.

Held, further, that the terms of the agreement were not sufficiently comprehensive to cover the substituted, renewed, or added stock in trade. *Kitching v. Hicks et al.*, 739.

Assignment for creditors—Fraudulent preference—Discretion of assignee.—See CONTRACT, 1.

Dominion Winding-up Act—Retrospective operation.—See CORPORATIONS, 1.

Assignee for creditors—Rights of.—See MORTGAGE, 5.

Dissolution of firm and division of assets—Partnership and individual property—Subsequent assignment for all creditors invalid as to personalty.—See PARTNERSHIP, 1.

Following trust moneys.—See TRUSTS AND TRUSTEES.

BANKS AND BANKING.

See BILLS OF LADING AND WAREHOUSE RECEIPTS—CORPORATIONS, 5.

BILLS OF EXCHANGE AND PROMISSORY NOTES.

Promissory note—Double stamping after repeal of Stamp Act, 45 Vic. ch. 1, D.—On an appeal from the report of a Master who had allowed the claim of a creditor, based on a promissory note unstamped at the time of its being made, and not properly double stamped until after the repeal of the Stamp Acts by 45 Vic. c. 1, D. It was

Held, that such double stamping was sufficient to validate the note, such right being reserved under the words "existing or accruing rights are preserved," and that no distinction could be made between a note that was current and a note that was overdue. *Caughill v. Clark*, 3 O. R. 272, and *Bank of Ottawa v. McMorrow*, 4 O. R. 345, referred to and commented on. *Card v. Cooley*, 229.

Agreement to renew—Death of maker.—See JUDGMENT.

BILLS OF LADING AND WAREHOUSE RECEIPTS.

Company—Raising money on warehouse receipts—Ultra vires—Banking Act—43 Vic., c. 22—Locus standi of execution creditors—Interpleader—Directors—By-law—R. S. O. c. 150.—Where, in a sheriff's interpleader, the M. Bank claimed the property in question as security for advances made by them to a certain company incorporated under R. S. O. c. 150, by virtue of warehouse receipts covering the property, and deposited with them by the said company as such security. Under R. S. O. c. 150, s. 28, "The directors shall have full power in all things to administer the affairs of the company, and may make * * * any description of contract which the company may, by law, enter into"; and by sub-s. 2 of sec. 30 of that Act, express power is given to the directors under the sanction of a by-law approved of by not less than two-third in value of the shareholders to hypothecate and pledge the real and personal property of the company to secure any sum borrowed, &c. There was no by-law in this case, but the board of directors was well aware of the nature and extent of the transaction with the bank and the hypothecation of the goods, and adopted what was done.

Held, that the property in the goods passed to the bank, and inasmuch as the company could not have resumed possession thereof without satisfying the bank's lien, neither could the execution creditors, who had no higher rights as to property seized than the original debtor.

Held, also, that even if a by-law were, strictly speaking, requisite in such a case, yet, where no complaint had been made by the company, or any of its shareholders, because of any irregularity or informality in what was done, as was the case here, an execution creditor could not be allowed to interfere, there being no imputation of fraud or illegality in its broad and culpable sense.

Held, however, upon the evidence in this case, the depositing of the goods in a warehouse, and the raising of money upon the security thereof, seemed to be an important constituent for the successful prosecution of the company's business, and to be such a matter as would fall within the competence of the directors to cause to be done through their manager, as was the course of dealing here. *Merchants' Bank of Canada v. Hancock et al.*, 285.

See CORPORATIONS, 5.

BILLS OF SALE AND CHATTEL MORTGAGES.

Chattel mortgage—Fraudulent preference—Statute of Elizabeth, R. S. O. ch. 95, sec. 13—Consideration.—In order to create a fraudulent preference under the Statute of Elizabeth as interpreted by R. S. O. ch. 95, sec. 16, not only must there exist a fraudulent intent in the mind of the mortgagor, but also in that of the mortgagee.

In this case, which was that of a mortgage of goods: *Held*, that no such intent was shewn on the part of the mortgagee; nor *Semble*, on the part of the mortgagor.

Part of the consideration of the mortgage was covered by a draft drawn by the mortgagee, a merchant,

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in the course of business, on the mortgagor, his customer, and discounted at a bank.

Held, that the mere fact of the draft having been discounted at the bank would not justify the Court in assuming that the debt represented by the draft was paid, and that the remedy on the draft was to be alone looked to; and therefore that the amount of the indebtedness in the mortgage could not be said to be untruly stated.

Meriden Silver Plating Co. v. Lee, 2 O. R. 451, commented on. *Hepburn v. Park et al.*, 472.

See BANKRUPTCY AND INSOLVENCY, 5—CORPORATIONS, 5—MORTGAGE, 5.

BOND.

Official assignee.] — See BANKRUPTCY AND INSOLVENCY, 2.

BRIDGE.

Bridge causing stagnant water—Riparian owner—Rideau Canal—8 Geo. IV. c. 1, s. 15—Access by water—Injunction—O. the owner of two lots of land divided in one place by G.'s land, and in another by a bay formed by the waters of the Rideau Canal, which washed the shores of all these lots, began to construct a bridge between his two lots for easier access between them, which bridge would have the effect of cutting off G.'s land from the canal, and of making the water between the bridge and G.'s land stagnant.

In an action by G. against O. for an injunction to compel him to desist from the work, and remove that part already constructed. It was

Held, that G. had the rights of an ordinary riparian owner, and that the stream being a navigable one made no difference, except that those rights are subject to the public right of navigation, that those rights had been injuriously affected by the defendant, that the plaintiff shewed that an injury would result to him if the work was completed, and that he might in good time bring his action to prevent the wrong, that even if the bay was not part of the Rideau Canal itself, so as to give him the rights of an owner or occupant of lands adjoining the canal under 8 Geo. IV. c. 1, s. 15, he was entitled to use it as a means of access to the canal, and that on the evidence the plaintiff was entitled to his injunction. *Gardiner v. Chapman*, 272.

BROKERS.

See STOCKHOLDERS.

BY-LAWS.

Unreasonableness.]— *See* MUNICIPAL CORPORATIONS, 1.

Necessity for—Corporation.]— *See* BILLS OF LADING AND WAREHOUSE RECEIPTS.

To clean and repair drain.]— *See* DRAINAGE.

See MUNICIPAL CORPORATIONS, 2, 3—TAVERNS AND SHOPS—WAYS.

CANCELLATION.

Of stock.]— *See* CORPORATIONS, 4.

CARRIERS.

See RAILWAYS AND RAILWAY COMPANIES, 1.

CERTIORARI.

Amendment of conviction after return of.]— *See* INDIANS.

CESTUI QUE TRUST.

See WILL, 1.

CHAMBERS.

Order for judgment—Summary application to set aside.]— *See* PARTNERSHIP, 1.

CHATTEL MORTGAGE.

See BANKRUPTCY AND INSOLVENCY, 5—BILLS OF SALE AND CHATTEL MORTGAGES.

CHILDREN.

See WILL, 6.

CLOUD ON TITLE.

Removal of.]— *See* FRAUD, 2.

COMPANY.

See BILLS OF LADING AND WAREHOUSE RECEIPTS—CORPORATIONS.

COMPENSATION.

Expropriation of land—Railways.]— *See* ARBITRATION AND AWARD, 1.

See RAILWAYS AND RAILWAY COMPANIES, 2.

COMPROMISE.

See HUSBAND AND WIFE, 3.

CONSIDERATION.

See BILLS OF SALE AND CHATTEL MORTGAGES.

CONTRACT.

1. *Assignment in trust for creditors—Impeaching the same on the ground of previous preferential conveyances—Fraudulent preference—Discretion of assignee as to sale—Transfer subject to payments to mortgagees—Power to carry on business of assignor—3 Eliz. ch. 5—R. S. O. ch. 118.*—Where it was sought to set aside a certain assignment of real and personal property made by an insolvent debtor to a trustee for creditors, on the ground that the assignee had, before the execution of it, satisfied some of his creditors in full by transferring goods of his to them in a manner alleged to be preferential, but the instrument impeached did not require the creditors to submit to any conditions, and did not provide for a release of the debtor in any manner.

Held, that the instrument was valid, and could not be set aside; and the case was distinguishable from those American cases which embody the principle that a debtor shall not be allowed to dispose preferentially of part of his estate, and as part of the same scheme to turn over the remainder of it to trustees for creditors by an instrument which provides for his discharge.

The duties of an assignee under such an instrument as the one in question in this case are analogous to those of executors and trustees administering estates, and the Court will consider that a year is a proper time within which the sale of the property assigned is to be made, where the assignment leaves the time and manner of such sale in the discretion of the assignee. If the sale be not made within a year the *onus* will be cast on the assignee of satisfying the Court of his *bona fides* in seeking further delay.

Semble, that where in such an instrument the goods are transferred subject to the payment of rent to a prior mortgagee this does not invalidate the instrument.

Where such an instrument provides for the carrying on of the business of the insolvent debtor by the assignee, but only as subsidiary to the winding up of the same, this is not unreasonable, and does not invalidate the assignment. *Ontario Bank v. Lamont et al.*, 147.

2. *Specific performance—Contract contained in letters and telegrams—"Coming to accept"—Parties not ad idem.*—M. offered to give J. \$1,500 for a certain lot of land containing a 50 feet frontage. J. replied that he would take \$1,750 for the 50 feet, or \$1,500 for 35 feet of the 50 feet. Before receiving any answer, J. telegraphed to M.: "Coming Monday to accept \$1,500. Waiting immediate reply." M. telegraphed back: "Come at once." M. now alleged that these telegrams constituted a contract for the sale of the 50 feet to him for \$1,500, and claimed specific performance.

Held, that the telegrams did not constitute any such contract, for it was ambiguous to which proposal of

HIGHWAYS.

See WAYS.

HOUSE.

Snow and ice falling from roof.]—
See MUNICIPAL CORPORATION, 2.

HUSBAND AND WIFE.

1. *Married woman—Dower—Separate estate.*]—A married woman married to her husband in 1871, was entitled to dower in land of which her former husband died seized, and was living thereon with her husband working it; but her dower had never been actually set apart or assigned.

Held, that this was separate estate, with reference to which she could contract debts or which she could contract to sell or dispose of; and that it could therefore be sold under a *fi. fa.* on a judgment recovered on a promissory note made by her. *Douglas v. Hutchinson*, 581.

2. *Marriage with a deceased wife's sister—Uncanonical marriage—Tenancy by the curtesy*—45 Vic. ch. 42, D.]—By English law as adopted in this Province in 1792, marriage with a deceased wife's sister was not *ipso facto* void, but was esteemed valid for all civil purposes, unless annulled during the lifetime of the parties. Such remained the law here until 45 Vic. c. 42, D., which removed all disabilities.

It is not necessary to entitle to tenancy by the curtesy that the marriage should have been canonical. *Re Murray Canal, Lawson v. Powers*, 685.

3. *Action for alimony—Right of plaintiff to compromise—Enforce-*

ment of compromise—Separate negotiations for settlement carried on simultaneously between clients and the solicitors respectively—"Without prejudice" O. J. A. Rule 97.]—*Held* (affirming the decision of WILSON, C. J. C. P.) A married woman cannot only bring an action against her husband in her own name, but she can also compromise it, or deal with it as she pleases, just as any other suitor can; and if the plaintiff and defendant have agreed to certain terms of settlement of such a suit, such contract can be enforced against the defendant, by the plaintiff suing in her own name without a next friend.

And so in the present case where, by way of compromise of such a suit, the parties to it agreed that the plaintiff should execute a proper deed of separation containing certain covenants by her, in return for which the defendant should convey to the plaintiff certain lands and pay certain moneys.

Held, that the plaintiff was entitled to specific performance of this agreement: that it was not the separation which was being enforced, but the performance by the defendant of his contract.

If, in such a case negotiations with a view to the settlement are carried on between the parties and a settlement concluded by means of letters marked "without prejudice," the letters may be given in evidence to prove the binding contract notwithstanding the restrictive words.

Per WILSON, C. J. C. P. If parties to an action authorize their solicitors to enter into negotiations for a settlement, and while the negotiations are proceeding, one party unknown to his own or to the opposite solicitors, writes to the other party personally withdrawing from the nego-

directors, and they had the right to say that the facts, if not communicated, were concealed from them. On the other hand, if they meant to dissent effectually from what was being illegally done, the shareholders were bound to take active and immediate measures to prevent or undo it. A mere protest would not be sufficient. *Thompson et al. v. Canadian Fire and Marine Ins. Co. et al.*, 291.

3. *Company—Purchase by company effected by preponderating vote of vendor—Rescission of contract—Directors—Shareholders—Trustee and cestui que trust—Sale of a director's property to the company of which he is a director.*—The board of directors of a steamship company passed a by-law authorizing the purchase for the company of a certain steamship owned by one of the directors, and, at a subsequent meeting of the shareholders, this by-law was confirmed, such result being attained by the votes of the owner of the steamer, who was the largest shareholder. The evidence shewed an entire absence of fraud or unfair dealing.

Held, nevertheless, on action brought by a dissentient shareholder, that the sale must be rescinded, for the vendor's threefold character of director, shareholder, and vendor necessarily involved a conflict between duty and interest, and the rule of the Court is, not to permit one so circumstanced to hold or exercise the balance of power in the conduct of a company's affairs, to the possible prejudice of any of the shareholders.

Quare, whether the sale could have been interfered with if the majority had been obtained without the vote of the vendor.

That the directors of a company are in a fiduciary position is plain beyond doubt, and

Semble, that in a case such as this ratification is required by every individual of the class constituting the *cestuis que trustent*. At all events, when a minority is sought to be bound the vote must be by a disinterested majority.

Apart from all statutory regulations, the general law applicable to sales of a director's property to a company of which he is a director appears to be this: if the contract is agreed upon by a vote of the directors in which the vendor joins, the transaction will be altogether invalid until the matter has been brought before a general meeting of the shareholders and approved. *Beatty v. North-West Transportation Co., (Limited)*, *et al.*, 300.

4. *Company—Stock, cancellation of—Fraud—Laches.*—The defendant, an original stockholder in a joint stock company, his stock being fully paid up, was elected a director, after a statement prepared by the company's secretary had been published by them, setting forth that the company was in a flourishing condition earning a ten per cent. dividend. On the faith of such statement defendant subscribed for new shares in the company, but soon afterwards suspecting that the statement was incorrect, he threatened legal proceedings to compel them to cancel the stock, whereupon a resolution was passed directing the books to be examined, and on such examination the statement was found to be false, and the company practically insolvent. A meeting of the shareholders was then called, and a by-law passed cancelling the stock. After the defendant's subscription for the new stock, and before the cancellation, as also before the defendant became aware of the falsity of the statement,

the plaintiff became a creditor of the company. The plaintiff, after such cancellation, issued a writ and obtained a judgment against the company, and then sued defendant for the amount of the new stock unpaid by him.

Held, that the plaintiff could not recover: that there was power to cancel the stock: that the cancellation was duly made; and that the defendant was not guilty of any laches. *Wheeler and Wilson Manufacturing Co. v. Wilson*, 421.

5. *Foreign corporation—Right to hold goods—Transfer of warehouse receipts—Bills of Sale Act—Banking Act.*—C. & O. carrying on business in Chicago, in the state of Illinois, for the manufacture of mill machinery, &c., had certain machinery manufactured for them in Stratford, Ont., which was warehoused with M. & T., at Woodstock, Ont. C. & Co. being pressed by plaintiffs, their bankers in Chicago, for collateral security for two of their notes of \$5,000 each, discounted by the plaintiffs, endorsed over to the plaintiffs the warehouse receipts for these goods. At the maturity of the notes, C. & Co., not being in a position to retire them, in pursuance of an arrangement to that effect, the warehouse receipts were cancelled and new ones, dated 12th October, 1883, were made out direct to the plaintiffs. On 3rd September, 1883, C. & Co. had made an assignment to a trustee in Chicago for the benefit of creditors. On 22nd November defendant placed writs of execution in the sheriff's hands against C. & Co., under which these goods were seized. No fraudulent preference or intent was proved.

Held, that the plaintiff, a foreign corporation, could hold personal property in Ontario; that C. & Co., being residents of the State of Illinois, the transfer must be governed by the law of that State, according to which the transfer was valid and effectual; that, even if dealt with as subject to the law of Ontario, when C. & T. gave the warehouse receipts direct to the bank, they held the goods for the plaintiffs, and there was therefore a transfer of both property and possession in the goods to the plaintiffs, subject to the trustee's rights, if any; and the goods being in the hands of third parties and not of C. & Co., the Bills of Sale Act did not apply; and also that the Act as to banks and banking, and warehouse receipts, did not apply to the plaintiffs, a foreign corporation. *Commercial National Bank of Chicago v. Corcoran*, 527.

Foreign—Lex loci contractus.—
See INSURANCE, 1.

See BILLS OF LADING AND WAREHOUSE RECEIPTS.

COSTS.

Appeal from Master—Ascertaining amount due by administrator pendente lite to an estate—Moderation of his solicitor's costs.—On an appeal from a certificate of the Master in which he held that under an order which directed him "to ascertain and state what amount (if any), is properly chargeable by J. H. against the estate of T. W. deceased, in respect of legal proceedings taken by the said J. H. as administrator *pendente lite* of the said estate in the Courts or otherwise," the bills of costs of the solicitor of the adminis-

trator should be taxed in order to ascertain the amount due. It was

Held, that the Master was wrong; that the bills should, if necessary, be subjected to moderation, and not taxation; that moderation is a well understood term, and is more liberal than taxation even as between solicitor and client. *Beatty v. Haldan*, 715.

Charge on estate.—See EXECUTORS AND ADMINISTRATORS.

See MORTGAGE, 2—SPECIFIC PERFORMANCE.

COUNCILLOR.

Interested in road—By-law closing.—See WAYS, 1.

COUNTY.

Roads between townships.—See WAYS, 2.

COVENANT.

See MORTGAGE, 1, 2.

CREDITORS.

Partnership and separate.—See PARTNERSHIP, 2.

Execution creditors—Locus standi.—See BILLS OF LADING AND WAREHOUSE RECEIPTS.

CROWN GRANT.

See DEED—SURRENDER.

CROWN LANDS.

Agent — Disqualification.—See PARLIAMENT.

CURTESY, TENANCY BY.

See HUSBAND AND WIFE, 2.—POSSESSION.

CUSTOM AND USAGE.

See STOCKHOLDERS.

DAMAGES.

Railway company—Expropriation of land.—See ARBITRATION AND AWARD.

Excessive.—See MALICIOUSLY ISSUING EXECUTION.

Quantum meruit.—See SALE OF GOODS.

See MUNICIPAL CORPORATIONS, 3.—RAILWAYS AND RAILWAY COMPANIES—WATER AND WATERCOURSES, 2.

DEBENTURES.

See MUNICIPAL CORPORATIONS, 4.

DEBTS.

Legal and equitable.—See PARTNERSHIP, 2.

DEED.

Crown grant—Description—Error—Evidence—Possession.—In 1851, J. purchased the whole of lot 20 from

the Crown, the lot nominally containing 200 acres and described in the Crown Lands Department Books as containing 175 acres more or less. On the 30th October, 1852, before taking out his patent, J. sold and assigned, by a written assignment to R., the east half or part of the lot described as seventy-five acres "neither more or less." In 1863 R. sold to B. his interest in this parcel, described as containing "75 acres more or less," and as being composed of the east part of the lot. On 22nd July, 1883, B. took out a patent of his portion, the land being described as "75 acres more or less," being all the lot except the west 100 acres. On 28th August, 1868, J., who retained all he had not sold to R., took out a patent himself, the land being described as the west 100 acres, without the words more or less, these words having been erased from the printed form on which the patent was written. Subsequently B. reconveyed to R., through whom the plaintiff claimed as heir of his father, and as having acquired the title of the other heirs. J., after obtaining his patent, conveyed the northerly and southerly portions to his two sons, the defendants. About the time J. took out his patent, on instructions from the plaintiff's father, a surveyor ran a line dividing the 75 acres from the 100 acres; and in 1874 he procured another line to be run under instructions to lay off the 75 acres, which was done, and the plaintiff's father and J. jointly erected a fence on such line. In 1883 the plaintiff discovered that the actual acreage exceeded 175 acres by some 11 acres. The actual occupation under B.'s patent was confined to the 75 acres.

Held, that B.'s patent would of itself include the 11 acres; and there

was nothing to shew that the patent was issued by fraud or mistake so as to entitle defendants to have it reformed; and that defendants on the evidence, except as to a small portion thereof, failed to shew any possessory title to the land in question. *Cairn v. Junkin et al.*, 532.

Absolute in form.—See MORTGAGES, 4.

See ESTATE.

DESCRIPTION.

Of goods.—See BANKRUPTCY AND INSOLVENCY, 5.

Errors in.—See DEED—WILL, 4.

DEVISE.

See WILL.

DIRECTORS.

Liability of.—See CORPORATIONS, 2.

Interested in contract—Rescission.—See CORPORATIONS, 3.

See BILLS OF LADING AND WAREHOUSE RECEIPTS.

DISCRETION.

Of assignee in insolvency.—See CONTRACT, 1.

Costs.—See MORTGAGE, 2.

DISQUALIFICATION.

For voting.—See PARLIAMENT.

Public school trustee.]—See PUBLIC SCHOOLS, 2.

DIVISION COURTS.

See MALICIOUSLY ISSUING EXECUTION.

DOMINION WINDING-UP ACT.

See CORPORATIONS, 1.

DOWER.

Will—Election.]—J. C., by his will devised as follows: First, I will and bequeath unto my beloved wife, E. C., one-half undivided of the place where I now live being * * * so long as she shall live and no longer. I also will and bequeath unto my said wife one-half of all the goods and chattels I may own at the time of my demise * * * Third, I will and bequeath unto my grandson, D. C., and to his heirs and assigns forever, the place or homestead where I now live, it being * * * with all that appertains thereto: subject, nevertheless, to the following conditions, that is to say; my wife E. C., shall have quiet and peaceable possession of all said premises with all that appertains to said half of said homestead for her own use and benefit as long as she shall live * * * I also will and bequeath unto my said grandson, D. C., one half of all the goods and chattels I may own at the time of my demise." In an action by the wife, E. C., claiming both the legacy and her dower, it was *Held*, that she must elect. The testator having treated the homestead as one whole thing, the half of which

he specifically bequeathed to his wife. *Card v. Cooley*, 229.

Separate estate.]—See HUSBAND AND WIFE, 1.

See MORTGAGE, 3.

DRAINAGE.

Drain—By-law to clean and repair—Deepening included in work done—Municipal Act, 1883, secs. 570, 589—Assessment, alteration of—Evidence.]—A by-law passed for raising the unpaid portion of the expense of cleaning out and repairing a drain, otherwise good on its face, was objected to on the ground that while the resolution and by-law authorizing the work to be done were for such cleaning and repairing only, the work actually done included deepening, which it was contended could only be done by petition therefor under sec. 570 of the Municipal Act. It appeared that the drain, if deepened, which was not free from doubt, was done accidentally, and not by design.

Under these circumstances, the objection being without merits, and as much inconvenience would ensue if the by-law was quashed, an application therefor was refused; but apart from this—*Quere*, whether under secs. 570, 589, of the Municipal Act, 1883, and 45 Vic. ch. 26, sec. 17, O., the municipality had not power without petition to do such work, including deepening, as might be incidental to maintaining the drain in an efficient state.

A further objection that the assessment was altered without notice, and without affording an opportunity to appeal was disallowed, the evidence failing to establish any such altera-

See MUNICIPAL CORPORATIONS, 3.
—WATER AND WATER COURSES, 2.

DRAWBACK.

See MECHANICS' LIEN, 2.

EARMARK.

Following trust moneys.] — See
TRUSTS AND TRUSTEES.

EASEMENTS.

See WATER AND WATERCOURSES, 1.

EJECTMENT.

See ESTOPPEL.

ELECTION.

Will.]—See DOWER.

Disqualification for voting.]—See
PARLIAMENT.

ERROR.

See DEED—ESTATE—WILL, 4.

ESTATE.

Conveyancing—Deed—Habendum
—Vesting—Resulting use—Mistake
—Non-professional conveyancers.]—
T. and his son D. desired to effect a
certain settlement of landed property,
but employed a non-professional con-
veyancer to draw the deed of settle-
ment, who failed to provide for many

agreement, and as to the land made
T., in consideration of natural love
and affection, grant the same to D.,
his heirs and assigns, *habendum*,
“after the decease of T. unto and to
the only proper use and behoof of D.,
his heirs and assigns for ever ;” and
D. now brought this action for waste
against T.

Held, that the deed was not void
as passing only a freehold to com-
mence in *futuro*, for the *habendum*
is not essential to a deed, and the
granting part was sufficient of itself
to pass the immediate freehold to D.,
the expressed consideration of na-
tural love and affection sufficing to
carry the use to D. in whom the
deed, viewed as a covenant to stand
seised, would vest the entire estate.

But *quære*, whether the express
limitation of the use in the *haben-
dum* after T.'s death would not rebut
the implication of an immediate
vesting of the use at the date of the
deed in D., so that the use of so
much of the estate as was not ex-
pressly limited, viz., for the life of T.,
resulted to and vested in T.

Held, however, on the evidence,
that the deed did not express the
true agreement of the parties, and
could not be allowed to stand ; but
D. having acted on the faith of the
arrangement for some years, and be-
ing willing to carry out the original
bargain, and execute proper instru-
ments, the deed should not be set
aside, but should be reformed.

The danger of employing unlearned
conveyancers commented on, and the
expediency of throwing safeguards
round the practice of conveyancing
pointed out. *Dunlap v. Dunlap*,
141.

Separate.]— See HUSBAND AND
WIFE.

ESTOPPEL

Ejectment—Possession obtained by attornment from plaintiff's tenant—Evidence of paper title—Registered memorial.]—Where the defendant, claiming to be the owner of certain land, procured the plaintiff's tenant to attorn to him and thereby claimed the possession :

Held, in ejectment, that the plaintiff was entitled to recover by reason of the defendant having thus obtained possession from the plaintiff's tenant; but that this was not to estop the defendant from disputing the plaintiff's title and shewing title in himself in any action he might bring to recover possession.

Evidence in proof of a paper title in the defendant commented on.

The production of a registered memorial executed by the grantee, where possession is not shewn to follow the deed, is not sufficient evidence in proof of the deed. *Mulholland v. Harman*, 546.

See MORTGAGE, 5.

EVIDENCE.

Lease—Parol agreement—Evidence to vary written document.]—The plaintiff sought to restrain the defendant from cutting timber on lands demised to him, contrary to the covenants in the indenture of lease. At the trial the defendant tendered parol evidence of an agreement between himself and the plaintiff, distinct from and prior to the lease, which, he contended, modified the restrictions in the lease, and gave him the right to cut the timber.

Held, (affirming the decision of *FERGUSON, J.*), that the evidence of

the parol agreement could not be admitted. *Gilroy v. McMillan*, 120.

Filing—Arbitration and award.]—*See* PRACTICE.

Parol.]—*See* MORTGAGE, 4, 6.

Quantum meruit.]—*See* SALE OF GOODS.

See DEED—DRAINAGE—MALICIOUS ARREST—PATENT OF INVENTION—SPECIFIC PERFORMANCE—SURRENDER—TRADE MARKS—WILL, 4.

Excessive damages.]—*See* MALICIOUSLY ISSUING EXECUTION.

EXECUTION.

Partnership and separate creditors.]—*See* BANKRUPTCY AND INSOLVENCY, 3—PARTNERSHIP.

Maliciously issuing.]—*See* MALICIOUSLY ISSUING EXECUTION.

EXECUTORS AND ADMINISTRATORS.

1. *Will—Tenant for life—Cost of repairs—Executrix—Costs of resisting a successful suit to establish a later will.*]—*M. H.* proved a will as executrix, afterwards a subsequent will was found dated about the time when the testator was in a weak state of health, both physical and mental. A suit was brought by *S. H.*, the executor in the later will against *M. H.* to set aside the first and establish the second will, which was successful, in which *M. H.* was ordered to pay the costs.

Held, that *M. H.*, in an action for an account of her dealings with the

estate, having a fair question for litigation in endeavoring to uphold the first will, was entitled to the costs thereof out of the estate.

M. H. having expended \$536.35 in repairs to the real estate and the testator's will having given her a life estate in all the real estate, and having also given her "the income of all investments of which I may be possessed for her own use, and also the principal of such investments as she may require to use for her own benefit."

Held, that the \$536.35 was properly allowed to her. *Hill v. Hill*, 244.

2. *Administration of company's deposit.*—See INSURANCE, 4.

EXPROPRIATION.

Of lands—Compensation.—See ARBITRATION AND AWARD, 1.

FALSE RETURN.

See PARTNERSHIP, 2.

FATHER AND SON.

Recovery for services—Agreement.—See SALE OF LANDS.

FINE.

Imprisonment in default of—Payment of.—See INDIANS.

FIRE.

Loss—Carriers—Warehousemen.—See RAILWAYS AND RAILWAY COMPANIES, 1.

FIRE INSURANCE POLICY ACT.

Property outside Ontario.—See INSURANCE, 2.

FORECLOSURE.

See MORTGAGE, 3.

FOREIGN CORPORATIONS.

See CORPORATIONS, 5.

FOREIGN COUNTRY.

Lex loci contractus.—See INSURANCE, 1.

FOREIGN JUDGMENT.

Action on—Statute of Limitations—Lex fori.—To an action on a foreign judgment recovered in the Supreme Court of New York, the defendant set up as a defence that the cause of action accrued more than six years before the commencement thereof.

Held, on demurrer, a good defence, for under our law the foreign judgment is only deemed to constitute a simple contract debt, and the period of limitation is governed by the *lex fori*, and not by the *lex loci contractus*. *North v. Fisher*, 206.

FOREIGN LAW.

See INSURANCE.

FOREIGN PATENTS.

Certified copies.—See PATENT OF INVENTION.

HOUSE.

Snow and ice falling from roof.—
See MUNICIPAL CORPORATION, 2.

HUSBAND AND WIFE.

1. *Married woman—Dower—Separate estate.*—A married woman married to her husband in 1871, was entitled to dower in land of which her former husband died seized, and was living thereon with her husband working it; but her dower had never been actually set apart or assigned.

Held, that this was separate estate, with reference to which she could contract debts or which she could contract to sell or dispose of; and that it could therefore be sold under a *fi. fa.* on a judgment recovered on a promissory note made by her. *Douglas v. Hutchinson*, 581.

2. *Marriage with a deceased wife's sister—Uncanonical marriage—Tenancy by the curtesy*—45 *Vic. ch. 42, D.*—By English law as adopted in this Province in 1792, marriage with a deceased wife's sister was not *ipso facto* void, but was esteemed valid for all civil purposes, unless annulled during the lifetime of the parties. Such remained the law here until 45 *Vic. c. 42, D.*, which removed all disabilities.

It is not necessary to entitle to tenancy by the curtesy that the marriage should have been canonical. *Re Murray Canal, Lawson v. Powers*, 685.

3. *Action for alimony—Right of plaintiff to compromise—Enforce-*

ment of compromise—Separate negotiations for settlement carried on simultaneously between clients and the solicitors respectively—"Without prejudice" *O. J. A. Rule 97.*—*Held* (affirming the decision of *WILSON, C. J. C. P.*) A married woman cannot only bring an action against her husband in her own name, but she can also compromise it, or deal with it as she pleases, just as any other suitor can; and if the plaintiff and defendant have agreed to certain terms of settlement of such a suit, such contract can be enforced against the defendant, by the plaintiff suing in her own name without a next friend.

And so in the present case where, by way of compromise of such a suit, the parties to it agreed that the plaintiff should execute a proper deed of separation containing certain covenants by her, in return for which the defendant should convey to the plaintiff certain lands and pay certain moneys.

Held, that the plaintiff was entitled to specific performance of this agreement; that it was not the separation which was being enforced, but the performance by the defendant of his contract.

If, in such a case negotiations with a view to the settlement are carried on between the parties and a settlement concluded by means of letters marked "without prejudice," the letters may be given in evidence to prove the binding contract notwithstanding the restrictive words.

Per WILSON, C. J. C. P. If parties to an action authorize their solicitors to enter into negotiations for a settlement, and while the negotiations are proceeding, one party unknown to his own or to the opposite solicitors, writes to the other party personally withdrawing from the nego-

162.]—The Fire Insurance Policy Act, R. S. O. ch. 162, does not apply to property outside of Ontario.

One of the conditions of a policy of insurance against fire on ice and packing, contained in an ice house situated in the state of Wisconsin, provided that the proofs of loss should be delivered "as soon after the loss as possible." The fire occurred on the 17th September, 1881, and the proofs of loss were not delivered until the middle of May, 1882, when they were objected to, and returned to the insured, who redelivered them in the same state in the month of July following. The only reason given for not delivering them sooner was, that it was not convenient to do so.

Held, that the condition was not complied with.

By the policy it was provided that the loss or damage should be "estimated according to the actual value of the property insured, that is, what it could have been actually sold for in cash at the time of loss;" and the condition on the policy required that the affidavit of loss should state the actual cash value of the property. In the printed proofs of loss, which were used, the words "actual cash value" were struck out, and a statement substituted giving the cost of the property in 1880, a year previous to the insurance being effected.

Held, that this was not compliance with the policy and condition.

Held, therefore, there could be no recovery on the policy. *Cameron et al. v. Canada Fire and Marine Ins. Co.*, 392.

3. *Joint contract—New contract by one of two joint contractors—S. O. c. 160, sec. 21, 22.*—J. M. and F. M., his wife, were jointly insured in the defendant's company, whose deposit was being administered under

R. S. O. c. 160, secs. 21, 22. On February 4th, J. M., without the assent of F. M., signed and sent to the receiver a claim for rebate as empowered under that Act. No acknowledgment of the receipt of this claim was given by the receiver, who, on February 27th, sent J. M. and the other policy holder a circular notifying them of an agreement for reinsurance, and that if they objected thereto, and desired to claim for rebate, they were to do so before March 15th. On February 24th the property was burnt, and J. M. forthwith claimed for the whole loss.

Held, that neither J. M. nor F. M. were bound by the former's claim for rebate. That it was not a release, but an invalid attempt by one to exercise a joint statutory power; or else an attempt to make a new contract, which was not authorized by one of the parties, and was not accepted by the receiver before the loss occurred.

Granting that a release by one joint tenant would extinguish the right of both, it does not follow that entering into a new agreement by one will prejudice the right of the other. *Clarke v. Union Fire Ins. Co—McPhee's Claim*, 635.

4. *Administration of insurance company's deposit—Receiver's schedule—Subsequent claim—Re-insurance—R. S. O. ch. 160, secs. 21-22.*—Pending administration of the deposit of the U. Insurance Company under R. S. O. ch. 160, secs. 21-22, and after the completion of the receiver's schedule prescribed by the Act, a re-insurance was effected with the A. Insurance Company of all the U. company's risks, in consideration of which the U. company gave the A. company its note. This note not being paid at maturity, the A. com-

the sanction of a medical man or minister of religion.

Held, also, that an amended conviction cannot be put in after the return of a writ of *certiorari*. *Regina v. MacKenzie*, 165.

See MUNICIPAL CORPORATIONS, 1.

INFANTS.

See WILL 4, 9.

INJUNCTION.

Disobeying injunction—Appeal—Stay of proceedings—Court of Appeal Act—Practice—R. S. O. ch. 38, secs. 26, 27.—Where an injunction is ordered at the hearing of a cause, and the parties enjoined give the security required by R. S. O. ch. 38, sec. 26, pending an appeal to the Court of Appeal, all proceedings to enforce the injunction are by virtue of sec. 27 of that Act thereupon stayed; and a writ of sequestration cannot therefore be obtained, pending the appeal, on the ground of non-compliance with the injunction.

Dundas v. Hamilton and Milton Road Co., 19 Gr. 455 followed, and preferred to *McLaren v. Caldwell*, 29 Gr. 438. *McGarvey v. Corporation of Strathroy*, 138.

See BRIDGE—REVIVOR—TRADE MARKS.

INSOLVENCY.

See BANKRUPTCY AND INSOLVENCY.

INSURANCE.

1. *Insurance company—Blank policy issued in a foreign country—*

Where contract made—Lex loci contractus.—The defendants signed and sealed a number of policies in blank, and sent them to an agent in New York to be filled up and issued as insurances were effected. A., their agent, there filled up one for a risk of \$2,500 on a lumber yard, a risk greater than *extra hazardous*, although he had been instructed not to take any extra hazardous risk for more than \$1,500. He issued the policy without receiving the payment of the premium, although a condition was indorsed on it that no insurance proposed to the company was to be considered in force until the premium should be paid in cash. The policy was issued on the 8th August. The fire occurred on the 10th August. A cheque for the premium was sent to the company on the 11th August, which was immediately returned, and the risk repudiated. Under the winding-up proceedings of the company it was attempted to prove a claim for the loss in the Master's office, when it was contended that the law of the state of New York, where the policy was issued, governed the contract, and under that law the agent had power to waive the payment of the premium. The Master disallowed the claim, holding that the law of Ontario governed the contract. On an appeal from the Master's certificate. It was

Held, that the Master was right. That the law of Ontario governed, as the place where the policy was signed and sealed was the place where the contract was made. *Clarke v. Union Fire Ins. Co. Re Export Lumber Co.*, 223.

2. *Proofs of loss—Delivery as soon after fire as possible—Actual cash value of property—Property situate outside of Ontario—R. S. O. ch.*

162.]—The Fire Insurance Policy Act, R. S. O. ch. 162, does not apply to property outside of Ontario.

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Held, that the condition was not complied with.

By the policy it was provided that the loss or damage should be "estimated according to the actual value of the property insured, that is, what it could have been actually sold for in cash at the time of loss;" and the condition on the policy required that the affidavit of loss should state the actual cash value of the property. In the printed proofs of loss, which were used, the words "actual cash value" were struck out, and a statement substituted giving the cost of the property in 1880, a year previous to the insurance being effected.

Held, that this was not a compliance with the policy and condition.

Held, therefore, there could be no recovery on the policy. *Cameron et al. v. Canada Fire and Marine Ins. Co.*, 392.

3. *Joint contract—New contract by one of two joint contractors—S. O. c. 160, sec. 21, 22.*—J. M. and F. M., his wife, were jointly insured in the defendant's company, whose deposit was being administered under

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Held, that neither J. M. nor F. M. were bound by the former's claim for rebate. That it was not a release, but an invalid attempt by one to exercise a joint statutory power; or else an attempt to make a new contract, which was not authorized by one of the parties, and was not accepted by the receiver before the loss occurred.

Granting that a release by one joint tenant would extinguish the right of both, it does not follow that entering into a new agreement by one will prejudice the right of the other. *Clarke v. Union Fire Ins. Co—McPhee's Claim*, 635.

4. *Administration of insurance company's deposit—Receiver's schedule—Subsequent claim—Re-insurance—R. S. O. ch. 160, secs. 21-22.*—Pending administration of the deposit of the U. Insurance Company under R. S. O. ch. 160, secs. 21-22, and after the completion of the receiver's schedule prescribed by the Act, a re-insurance was effected with the A. Insurance Company of all the U. company's risks, in consideration of which the U. company gave the A. company its note. This note not being paid at maturity, the A. com-

pany sought to be placed on the dividend sheet of the U. company for dividends accrued or to accrue.

Held, that it was entitled to the relief asked, for properly viewed the subject of the claim existed before the schedule, though in a different shape, since by the arrangement with the A. company, made with the assent of persons entitled to rebates, the liability of the U. company in respect to rebates was greatly reduced, and to that extent the A. company should be taken to be subrogated to the position of the policy holders of the U. company. *Clarke v. Union Fire Ins. Co.—Agricultural Fire Ins. Co. of Watertown, New York's Claim*, 640.

See MUNICIPAL CORPORATIONS, 3.

INTENT.

Fraudulent preference.]—*See* BILLS OF SALE AND CHATTEL MORTGAGES.

INTERPLEADER.

Sheriff—Abandoning goods — Attachment.]—Under an execution in *McLean v. Anthony*, the sheriff, on the 19th April, 1883, having seized the defendant's goods, sold them to one Ferguson, there being at the time rent overdue to the landlord. Ferguson did not remove the goods from the premises. By agreement between the landlord, the sheriff, and Ferguson, the latter retained sufficient of the purchase money to pay the claim for rent. Subsequently Ferguson sold the goods to one English, when it was arranged that English should pay the old claim for rent, and a further instalment which had meanwhile fallen due. The defendant then

surrendered his term, and English became tenant. On the 23rd April, an execution in *Slater v. Anthony* was placed in the sheriff's hands, and he seized the same goods some time between 21st May and 23rd June. English having claimed the goods, the sheriff interpleaded, and an issue was directed which resulted in favour of Slater. Pending the interpleader issue the sheriff allowed the landlord's bailiff, who also claimed the goods for arrears of taxes, to sell them and pay the rent and taxes in arrear. At the conclusion of the interpleader issue it appeared that the sheriff had taken no security for the goods, and that English, the claimant, was worthless.

Held, that there being no claim either for rent or taxes which the sheriff was justified in acknowledging he was liable to an attachment, on motion of his execution creditor, for disobedience of the interpleader order. *McLean v. Anthony. Slater v. Anthony*, 330.

See BILLS OF LADING, AND WAREHOUSE RECEIPTS.

INVENTION.

See PATENT OF INVENTION.

JOINT CONTRACT.

See INSURANCE, 3.

JOINT TENANTS.

Release.]—*See* INSURANCE, 4.

JUDGMENT.

Motion for immediate judgment—Rule 324—Promissory note—Agree-

ment to renew—Death of maker.—
During the currency of a promissory note it was agreed between the indorsee and indorser that the note should be renewed at maturity, and from time to time on payment of a named sum, "if the renewals notes are continued in the same firm or names as at present." Before the maturity of the note the maker died. After its maturity in an action on the note against the endorser the defendant set up such agreement as a defence, and alleged that he duly offered to perform it so far as lay in his power by leaving the said note and liability of the maker and giving his note in renewal as agreed as collateral to the said note, which tender the plaintiff refused to accept, and which the defendant is at all times ready and willing to carry out.

A motion for immediate judgment under Rule 324, was dismissed, the Judge refusing to decide as to the legality of the defence on such motion. *Federal Bank v. Hops*, 209.

Rule 324—Order for made in Chambers—Summary application to set aside—Pleading.—See PARTNERSHIP, 1.

See FOREIGN JUDGMENT.

JURY.

Failure to answer questions—New Trial.—See FRAUD.

LACHES.

See CORPORATIONS, 2, 4.

LANDS.

Injurious effect—Damages.—
See ARBITRATION AND AWARD, 1.

LANDLORD AND TENANT.

See ESTOPPEL—EVIDENCE—INTERPLEADER.

LETTERS

Contract contained in.—See CONTRACT, 2.

LEX LOCI CONTRACTUS.

See FOREIGN JUDGMENT.

See INSURANCE, 1.

LEX FORI.

See FOREIGN JUDGMENT.

LICENSE.

See TAVERNS AND SHOPS.

LIEN.

See MECHANICS LIEN.

LIMITATIONS, STATUTE OF.

See FOREIGN JUDGMENT—WATER AND WATER COURSES, 1.

LIQUORS.

See INDIANS—TAVERNS AND SHOPS.

MALICE.

See MALICIOUS ARREST—MALICIOUSLY ISSUING EXECUTION.

MALICIOUS ARREST.

General issue by statute—Necessity of pleading—Evidence.—In an ac-

tion for malicious arrest the jury found a general verdict for the plaintiff, with \$200 damages. They also specially found, in answer to a question put to them, "that the defendant honestly believed that his duty as constable called upon him to make the arrest." The learned Judge thereupon entered a nonsuit, holding that the defendant should have received notice of action. The general issue by statute R. S. O. ch. 73, was not pleaded, and the statement of defence was not framed so as to enable the defendant to avail himself of it; and the Court were of opinion under the facts, set out in the case, that there was no evidence on which the special finding of the jury could be supported.

Held, that the nonsuit must be set aside, and judgment entered for the plaintiff, with \$200 damages as assessed.

If the statute has not been pleaded honest belief is no defence, if there existed no reasonable ground for such belief. *McKay v. Cummings*, 400.

MALICIOUSLY ISSUING EXECUTION.

Issue of execution and seizure of goods after payment of debt—Malice—Trespass—Division Courts—R. S. O. ch. 47 sec. 160—Excessive damages.—The defendant having recovered a judgment against the plaintiff in the Division Court at Toronto, a transcript was ordered to be sent to another Division Court at Unionville, but by some mistake in the Division Court office it was not sent until after the debt had been paid, and the clerk of the Toronto Court endorsed on it a direction to the clerk of the other Court to issue execution

and remit the money to him when made. The plaintiff's goods having been seized under this execution, he sued the defendant for having wrongfully and maliciously and without reasonable or probable cause caused the same to be issued and the plaintiff's goods to be seized thereunder. The defendant had never interfered or given any directions beyond instructing the suit to be brought.

Held, that the plaintiff could not recover: that it was his duty to protect himself by seeing that the clerk of the Division Court was notified of payment of the debt, and there was therefore no malfeasance or omission on defendant's part.

Held, also, that the defendant was not liable in trespass, for he had not authorized the direction by the clerk to issue execution, which was no part of the clerk's duty; and *Semble*, that neither could he have been responsible if his attorney had directed it, after the suit had been settled.

Quære, under R. S. O. ch. 47, sec. 160, whether a person whose goods have been seized under Division Court process, can have any further relief than the restoration of his goods.

Held, also, that the damages given were, under the facts set out in the case, grossly excessive. *Tuckett v. Eaton*, 486.

MANDAMUS.

To admit child to public school.—*See PUBLIC SCHOOLS*, 1.

Compensation.—*See RAILWAYS AND RAILWAY COMPANIES*, 2.

See MUNICIPAL CORPORATIONS, 4.
—*REVIVOR*.

MARGIN.

Purchase of stock on.]—See STOCK-HOLDERS.

MARRIED WOMAN.

See HUSBAND AND WIFE.

MASTER.

Appeal from.]—See COSTS.

MECHANICS LIEN.

1 *R. S. O. ch. 120*—*Sale of the property after the lien arose but before registration—Omission of word "owner"*—*Waiver.*]—M. having bargained in January with R. & E. to do certain work and supply certain machinery in their mill, the last of the work being done and the last of the machinery supplied on the 28th July, filed his lien on the 25th August and commenced his action 2nd October. On the 24th July, R. & E. had sold and conveyed the mill to P. who, not being aware of this claim, registered his conveyance on 29th July. The lien registered made no mention of P. as "owner" and M. had drawn a draft for part of the money at three months, dated 28th July, which had been accepted by R. & E.

Held, that M. was entitled to his lien notwithstanding the sale to P. That the omission of P. as owner did not invalidate the lien, and that the drawing of the draft did not operate as a waiver of the lien. *Makins v. Robinson*, 1.

2. *Unfinished contract—New contractor—Ten per cent drawback.*]—W. entered into a contract with M. to do certain carpenter work on build-

ings for a contract price of \$2,690, which was afterwards, after taking an account of the extras to and omissions from the contract, increased to \$2,781.85. He proceeded with the contract, and did work to the value of \$2,350 and received on account, \$2,125, when he failed and notified W. that he could not proceed with the contract. W. then entered into a contract with C., who was M.'s surety, to finish the work, which he did at an expense of \$525.88. Certain sub-contractors and employees of M. filed liens, and W. moved to have them vacated on the ground that he was entitled to apply the 10 per cent. drawback in completing the contract.

Held, (reversing in part the order of Proudfoot, J., who dissented,) that the amount upon which the 10 per cent. drawback was to be calculated was not the whole amount of the contract price, but the amount of the work done by the contractor when he failed and abandoned the work. *Re Cornish*, 259

MEMORIAL.

Registered.]—See ESTOPPEL.

MISREPRESENTATION.

See FRAUD.

MISTAKE.

See DEED.

MORTGAGE.

1. *Statutory Short Form—Written and printed provisions—Earlier and later provisions* — *Construction* —

Moneys paid under protest—R. S. O. ch. 104.—M. gave a mortgage to T. on certain lands. The mortgage was in the statutory short form, except that immediately after the printed covenant for payment the following words were inserted in writing: "It being understood, however, that the said lands only shall in any event be liable for the payment of the mortgage." The distress clause remained un erased in its usual place, viz., after the covenants. T. assigned the mortgage to H., who, on an instalment of interest falling due, distrained for it. M. now brought this action for a wrongful distress.

Held, that M. was entitled to recover the amount distrained for with interest and costs, for the earlier provision controlled the subsequent one, both because it was first in the deed, and because it was in writing, and the words superadded in writing were entitled to have greater effect attributed to them than the printed clauses.

Green v. Duckett, 11 Q. B. D. 275, followed, as to the right to recover moneys paid under protest. *McKay et al. v. Howard*, 135.

2. *Covenant to build house, fence and clear—Forfeiture of extended terms of payment—Relief against forfeiture—Costs in discretion of the Court—O.J.A., Rule 428.*—The defendant gave a mortgage to the plaintiff in which he covenanted to pay the mortgage money in nine equal annual instalments, and also to clear up and fence ten acres in each year for five years from the date of the mortgage, and to build a log house on the land within one year, and there was a proviso, that the mortgage should immediately become due and payable after default being made in building the house, and clearing

the land at the periods of time above mentioned." No default occurred in payment of the mortgage money, but the log house was not built until about a month after the expiry of the first year, nor were ten acres fenced, though more than ten were cleared.

Held, that the plaintiff was entitled to insist on a forfeiture of the extended terms of payment in consequence of the breach of covenant as to the erection of the house, and to judgment for redemption or foreclosure, but should have no costs.

Relief is given against forfeitures for non-payment of rent, and in certain cases for neglecting to insure, but no case appears in which default like the present has been relieved against.

Semble, that if the only default had been the not putting up of the fence, the forfeiture would have been relieved against, for the clearing of the land was the substantial part of that covenant.

Semble, also, that in this province equity will not relieve against a proviso in a mortgage that on default of payment of a part of the debt, the whole shall become due. *Graham v. Ross*, 154.

3. *Foreclosure—Right of mortgagor's wife.*—Plaintiff, being the wife of A. W. C. who mortgaged his lands, she joining therein for the purpose of barring her dower, brought an action to be allowed to redeem the mortgaged premises after foreclosure by the mortgagee against the husband, but during the husband's lifetime.

A demurrer to the plaintiff's statement of claim, on the ground that the plaintiff had no interest in the lands, and that her pleadings affirmed that her husband's interest had been

foreclosed, was allowed. (*Haight et al.*, 451.

4. *Absolute deed—Parol*
—Ratification—Fraudulen
—Mortgage or no mort

Where the plaintiff brought an action to redeem a certain tract of land conveyed by him in a deed in form, and it appeared that the deed in question, which was sought to cut down to a mortgage, had indeed been executed for the purpose of securing a loan to the grantee, but that the subject of the transaction was the property from the result of an anticipated action for breach of contract.

Held, that under these circumstances, evidence was not admissible to rectify the form of the instrument, for this Court never assists a party who has placed his property in the name of another to defraud a creditor; nor does it signify that any creditor has been actually defeated or delayed.

The decided weight of authority is that after the property has been put in the hands of a third party, whether by the execution of a deed or by other means, and sufficient in law, it is not open to a fraudulent grantor to undo the transaction either out of Court or by the aid of the Court.

Symes v. Hughes, L. R. 10 Ch. 101, commented upon. *Munroe v. Lewis et al.*, 625.

5. *Mortgage of going*
Mortgage of factory—
Chattel mortgage not in
possession of registration—Right
of signee for creditors.]—*H*
a mortgage to R. to secure
debt and future advances
it was recited that security
given "by the lands

the money that had been advanced was partly for the purposes of the printing office, in which only he claimed to be interested as such partner, and the future advances were to be partly for the same purposes; and that he had then made no objection, and asserted no claim.

Held, that under these circumstances H. C. S. was estopped from setting up any right or title as against the mortgagees, whose title was the same as if he had joined in the mortgage.

The defendant, who was assignee for creditors of the mortgagor, was threatening to remove certain of the property comprised in the mortgage, acting, as he said, for the benefit of the creditors. The plaintiffs claimed an injunction to restrain him. In his defence he alleged that he was a creditor of the mortgagor at the time of the execution of the mortgage in question, and that after the commencement of this suit he recovered a judgment for the amount of his debt, and he claimed a right to the property taken by him as against the plaintiffs as such creditor.

Held, that he was entitled thus to avail himself of his position as a creditor at the date of the mortgage, notwithstanding the fact that in removing the goods he had alleged that he had acted for the benefit of the creditors, and although he did not recover his judgment and execution before the commencement of the suit.

An assignee for the benefit of creditors takes only such title as his assignor had to the property. *Robinson et al. v. Cook*, 590.

6. Mortgage—Parol Evidence.]—

A mortgage was made by T. to W., who assigned it to M. No money was actually advanced on the mortgage by W., but before the said

assignment to M., a parol agreement was come to between M. and T. that M. should hold the mortgage as security for a debt which T. owed to M. on a promissory note.

Held, that M. was entitled to hold the mortgage as security for the amount due him from T.

The rule that a mortgage for a specific sum may be shewn to be for other purposes by parol evidence, is not confined to cases where the person having the legal estate is the original mortgagee whose claim has been paid off, and with whom the new agreement for security has been made. The same principle must apply whenever the legal estate becomes vested in the creditor by the agreement of the mortgagor, as here, *McIntyre v. Thompson et al.*, 710.

See BILLS OF SALE AND CHATTEL MORTGAGES.

MOTION

For judgment—Rule 324.]—See JUDGMENT.

To set aside award.]—See PRACTICE.

To commit.]—See REVIVOR.

MUNICIPAL CORPORATIONS.

1. *By-law—Animals running at large—Unreasonableness—Mode of enforcing penalty—Indians and Indian lands—Quashing amending by-law after lapse of year from original by-law.]—By-law No. 84, passed by the township of Onondaga on 29th of May, 1882, prohibited certain animals therein named running at large; and provided that, except between the 10th May and the 1st December in any year, it should not be lawful for the owners of any other animals, not*

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Lazarus v. Corporation of Toronto, 26 U. C. R. 9, commented on and distinguished. *Lundreville v. Gouin*, 455.

3. *Municipal law—Drainage—Nuisance—Action for damages—Arbitration—R. S. O. ch. 174, secs. 369, 373, 466, sub-sec. 51, 529, seq.*—The defendants constructed a number of drains in their town, discharging into a creek running through the lands of the plaintiff, which drains conducted a quantity of brine or salt and refuse from salt manufactories in the neighborhood into the creek, and rendered the water filthy and unfit for drinking, and also corroded the machinery in the plaintiff's woollen factory. And the defendants, having passed a by-law, to deepen the said creek, threw down the plaintiff's fences, entered upon his land, and threw up earth from the bed of the creek and left it there.

Held, (affirming the decision of *PROUDFOOT, J.*.) that the drains not being constructed under a by-law, the plaintiff was entitled to maintain an action for his injury sustained, and for an injunction, and was not compelled to sue those who had discharged the offensive matter into the drains, nor to seek his remedy under the arbitration clauses of the Municipal Act, nor to resort to *mandamus* to compel better drainage.

Held, also, that damages for the trespass on the plaintiff's land could be recovered by action, as the corporate powers under the by-law for deepening the creek might have been exercised without the commission of the trespass; and this, too, notwithstanding that the work was done under and by means of a contractor, who, however, was not an independent contractor, but worked under the superintendence of the council.

Semble, per PROUDFOOT, J., that the right to foul the stream could not be acquired by the defendants by a user of twenty years. *Van Egmond v. Corporation of Seaforth*, 599.

4. *Corporation—Mandamus to levy sinking fund—R. S. O. ch. 180, sec. 88—46 Vic. ch. 18, sec. 359.*—Where a municipal corporation issued debentures under authority of certain by-laws which required a sinking fund to be raised each year to provide for payment of the principal at maturity, but the corporation omitted to raise such sinking fund.

Held, that they should be compelled by *mandamus*, on the application of a debenture holder, to raise the sinking fund for the current years, and that proceedings were properly taken against the corporation, and not the clerk of the municipality, notwithstanding R. S. O. ch. 180, sec. 88. For that enactment must be taken in connection with 46 Vic. ch. 18, sec. 359, and the clerk is not to insert in the collector's roll any sums which the council has not directed to be levied.

Held, however, that the *mandamus* could not include the levy of the rate for a sinking fund in future years, nor *semble* the levy of arrears.

The not levying a rate for the sinking fund is an annual breach of duty, and upon any breach a right arises to have it corrected. *Clarke v. Corporation of Palmerston*, 616.

Power to clean and repair drain without by-law.—See DRAINAGE.

Interest of arbitrators—Time for making award.—See PRACTICE.

See WATER AND WATERCOURSES, 2—WAYS.

NAME

Fraudulent use of.—S
MARKS

NEGLIGENCE

See MUNICIPAL CORPOR
— RAILWAYS AND RAILW
PANIES.

NEW TRIAL

*Failure of jury to ans
tions.*—*See* FRAUD, 1.

See MUNICIPAL CORPOR
— STOCKHOLDERS.

NOTICE.

Sufficiency of.—*See* AR
AND AWARD, 1.

*Of claims—Liability a
divided.*—*See* BANKRUPTC
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See REVIVOR.

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1. *Dissolution and division of assets — Partnership and individual property—Subsequent assignment for benefit of all creditors invalid as to personalty — Judgment under Rule 224, O.J.A.—Order made in Chambers — Summary application to set aside—Pleading.*—E. & J. being in partnership, dissolved and divided their assets. Subsequently E. being sued by M. an individual creditor, made an assignment of all his estate, real and personal, for the benefit of his creditors, and by the terms of the assignment, placed his partnership and individual creditors on the same footing. In an action by M. (after he had obtained judgment) to set aside the assignment. It was

Held, that after the dissolution and division of assets, E.'s share became his separate property, and could not be assigned for the benefit of his partnership creditors until his individual debts were first paid, and that the assignment as to personalty was bad and must be set aside, but that a debtor may give a preference to one creditor over another under the Statute of Elizabeth, and that the assignment as to realty was good.

Held, also, that where an order for the signing of a judgment under Rule 324, O. J. A., was made in Chambers instead of Court, it must be taken advantage of by a summary application, and that its invalidity could not be set up in an action founded on it. *Martin v. Evans*, 238.

2. *Execution against individual members of a firm—Execution against the firm—Priorities between.*—R. & E. were partners in business, and became financially involved. L. R. & Co. obtained a judgment against

the firm for a firm debt, and placed the execution in the sheriff's hands, with a direction to levy of the goods of R. Subsequently the plaintiffs obtained a judgment against R. and E. individually, and as members of the firm, and placed their execution in the sheriff's hands. The sheriff made the greater part of the amount of the plaintiffs' execution out of the assets of the firm, and returned it "*nulla bona*" as to the residue, although while the plaintiffs' execution was in his hands, he had sold the furniture of R., being his individual property, and applied the proceeds upon the execution of L. R. & Co., which was first in his hands; and notwithstanding that the plaintiffs' solicitor had notified him that the plaintiffs claimed the proceeds of the furniture as applicable to their execution only.

Held, (reversing the judgment of PROUDFOOT, J., *ante* p. 644, PROUDFOOT, J., dissenting) that the plaintiffs could not recover against the sheriff for a false return: that the property of the individual partners was liable on a judgment against the firm; and that the plaintiffs were not entitled to priority over the first execution, because their judgment was against the partners as individuals as well as members of the firm.

Per PROUDFOOT, J., the rule that the joint estate is for joint creditors, and the separate estate for separate creditors, is not confined to cases of bankruptcy and the administration of assets on the decease of a partner, and there are various ways in which the question may be raised in equity. Although it may be proper enough to give a creditor the benefit of his diligence, where the contest is between several creditors of the same debtor, with no equity arising from the nature of the property taken in

than the later decisions, which seem to recognize the right in the reissue to broaden the claims in a manner which the law does not appear to justify. *Withrow et al. v. Malcolm et al*, 12.

PENALTY.

Mode of enforcing.—See MUNICIPAL CORPORATIONS, 1.

PLEADING.

Judgment under Rule 324—Order made in Chambers—Summary application to set aside.—See PARTNERSHIP, 1.

General issue by statute—Necessity for pleading.—See MALICIOUS ARREST.

See PATENT OF INVENTION—RAILWAYS AND RAILWAY COMPANIES, 2—SPECIFIC PERFORMANCE.

PLEDGE.

Of stock.—See SHAREHOLDERS.

POSSESSION.

Marriage with deceased wife's sister—Uncanonical marriage—Tenancy by the curtesy—45 Vic. c. 42, D.]—In 1869 L. married G., his deceased's wife's sister. G. having had a son by L., died in 1871, seized of certain lands of which L. remained in continuous possession until 1883, the time of action brought.

Held, that L.'s occupation was to be attributed to his rightful character, which was that of tenant by the curtesy, so as not work tortiously

against the heirs-at-law of the wife. *Re Murray Canal—Lawson v. Powers*, 685.

Attornment from plaintiff's tenant.—See ESTOPPEL.

See DEED—WATER AND WATER COURSES, 1—WILL, 1.

PRACTICE.

Municipal Act—Arbitrators—Award—Time for making award—Interest of arbitrator—Filing evidence—Award ordered to be made by Chancery Division—Setting aside in Queen's Bench Division—R. S. O. ch. 174.—*Quere*, whether an award made by arbitrators pursuant to the Municipal Act R. S. O. ch. 174, is invalid though made more than a month after the appointment of the third arbitrator, notwithstanding section 377 of the Act.

By section 378 no member, officer, or person in the employment of a corporation interested in any arbitration, nor any person so interested, shall act as an arbitrator under the Act.

Semble, that a ratepayer was disqualified, and that the objection would not be waived by mere acquiescence.

By section 383 the arbitrators are to file with the Clerk of the Council the notes of the evidence taken. There being two councils interested in the arbitration, the arbitrators did not know with which clerk to file the evidence, and did not file it.

Held, that the award was not thereby invalidated.

The award having been directed to be made within a year by an order of the Chancery Division, where the parties were litigating concerning it.

Held, that the motion to set aside or refer back on the grounds, or on the merits, have been made in this case and should be transferred to the jurisdiction of the *Muskoka and Gravenhurst*, 35

Judgment under Rule made in Chambers—Summons to set aside.]—SHIP, 1.

See INJUNCTION

PREFERENCE

Pressure.]—See BANKRUPTCY AND INSOLVENCY, 1.

See BILLS OF SALE AND MORTGAGES—CONTRACTS

PRESSURE

See BANKRUPTCY AND INSOLVENCY, 1—STOCKHOLDERS.

PRINCIPAL AND AGENT

See PARLIAMENTARY

PRINCIPAL AND AGENT

See BANKRUPTCY AND INSOLVENCY

PROCEEDINGS

Stay of.]—See INJUNCTION

PROOFS OF

See INSURANCE

under 44 Vic. ch. 30, sec. 13, O.
Regina ex rel., Stewart v. Standish,
408.

PUBLIC LANDS' ACT.

See PARLIAMENT

PURCHASERS.

See WILL

RAILWAYS AND RAILWAY COMPANIES.

1. *Carriage of goods beyond defendants' line—Carriers—Warehousemen—Loss by fire—Negligence—Proximate cause of loss.*—Four carloads of flour were delivered to defendants to be carried from Newmarket, Ont., to Chatham, N. B., under a special contract, whereby defendants were not to be liable for any delay occasioned by want of opportunity to forward goods beyond places where defendants had stations, but they could forward them to their destination by public carriers or otherwise, as opportunity might offer: that pending communication with the consignees the goods remained on the defendants' premises at the owner's risk; and that defendants were not to be liable after notification to the carriers, that they were ready to deliver the goods for further conveyance; and that defendants were not to be liable for loss by fire. It appeared that the defendants' line did not extend beyond Toronto, and that the goods were to be forwarded by the G. T. R.: that on their arrival at Toronto, they were placed in defendants' freight sheds, and notice, addressed to the

consignee, sent to the consignor at Newmarket, and also to the G. T. R. Co., that the defendants were prepared to deliver the goods for further conveyance; and that, after such notice, while the goods were in defendants' freight sheds, they were destroyed by fire without any negligence on defendants' part.

Held, that defendants were not liable as carriers, because they had expressly limited their liability; nor as warehousemen, because no negligence was shewn; the only negligence suggested being that defendants did not procure or supply cars for the transshipment before the fire, but that this was not sustainable; and even if this could constitute negligence, *quære*, whether the recovery could be for more than nominal damages, i. e., whether the loss by fire was the damage naturally resulting from such negligence. *Brodie v. Northern R. W. Co.*, 180.

2. *R. W. Co.—Pleading—Allegation that work "negligently" done—Mandamus—Compensation.*—The plaintiff in his statement of claim claimed damages from the defendants for "unlawfully, negligently and wrongfully" depressing certain streets in a town and thereby making it inconvenient and almost impossible for persons to approach the plaintiff's store for business: also for, in like manner, blocking them up and rendering them almost impossible in the neighbourhood of the plaintiff's store, and thereby "negligently, unlawfully, and wrongfully," preventing customers or others coming thereto, and almost entirely destroying the plaintiff's business. The statement further claimed that if the depressing and blocking up should be found to be lawful, a mandamus should be granted requiring the defendants to



the plaintiff in the pleadings mentioned," the trespass complained of being two walls built by the defendant on four inches of the plaintiff's land, it was objected: 1. That the suit was revived while pending in the Court of Appeal by an order issued from the Division of the High Court of Justice appealed from. 2. That no certificate of the Supreme Court (which had in substance affirmed the decree) had been served; and 3. That the notice of motion did not specify the acts of disobedience. It was

Held, that the suit was properly revived: that it was not necessary to serve the certificate of the Supreme Court when the decree was not materially altered, and when the defendant well knew that the decree would be enforced; and that when (as in this case) a correspondence had shewn the defendant what acts were complained of, it was not necessary to repeat them in the notice of motion; and the objections were overruled.

Held, also, that under the form of the decree, the plaintiff was entitled to have the walls removed, and if the defendant did not remove them within a month the order must go. *Grasett v. Carter*, 584.

RIDEAU CANAL.

See BRIDGE.

RIPARIAN OWNERS.

See BRIDGE.

ROADS.

See WAYS.

ROOF OF HOUSE.

Snow and ice falling from.—*See* MUNICIPAL CORPORATIONS, 2.

RULE NISI.

See WAYS, 1.

QUANTUM MERUIT.

See SALE OF GOODS.

QUIETING TITLE.

See WILL, 4.

SALE OF GOODS.

Acceptance—Quantum meruit.—The defendant purchased from the plaintiff a car load of "No. 1 Green Hoops" to be delivered at the railway station. On their arrival at the station they were removed by the defendant to his own place, and some of the hoops used by him, but merely, as he said, for the purpose of testing them. He then wrote to the plaintiff that he was astonished at his sending dry and rotten hoops for first class green hoops, and if he, defendant, had seen them before they were at his place he would not have touched them: that there were less in the car than the number stated by the plaintiff; that he enclosed a bill which was the amount he intended to pay, and not a cent more, because they were not worth that: and if the plaintiff would accept the amount offered to let the defendant know by return mail, and he would remit. In answer, the plaintiff, through his solicitor, threatened a suit, when the defendant replied that if plaintiff

would not accept this he
and sue.

Held, there was eviden
the jury of an accepta
hoops, and an agreement
quantum meruit. *McClu*
teziger, 480.

SALE OF LAND

Promise to make a will
tation—Part performanc
and son—Statute of Fra
the plaintiff, alleged that
father being the owner
land, induced him to abste
forcing a certain claim, s
work on the land, by r
that he would devise t
him, which he afterward
ed that he had done; an
ing dead, C. C. now clai
as against one to whom
devised it by a later wil
the former one. The e
the former will was prove

Held, reversing the
Proudfoot, J., that this v
part performance as to
out of the Statute of Fra
execution of the former
act of the person whose c
sought to charge, and no
son seeking to enforce t
and, moreover, did not in
tract, but only indicat
lent intention displayed
tor in the execution of ar
essentially of a revocable

Quære, whether if it
proved, which it had not
had by his representat
had devised the land to
duced him to forego his c
work on the land as a
would have entitled C. C.

To take a case of alleg
concerning land out of th

SEDUCTION.

Service—Right to maintain action.
]—In an action for seduction of the grand-niece of the plaintiff, it appeared that on her father's and mother's death, when she was about twelve years old, she went to live with the plaintiff, and from thence went out to service to various persons, and at the time of the seduction, and for three years previously, was in the service of one C. retaining her wages for her own use. She was seduced by the defendant in the month of April, being then about nineteen years old. In June following she went to Detroit for a couple of weeks, and from thence to the plaintiff's, where she resided until she was sick, when she went to the hospital, where she was confined. While at the plaintiff's she worked, and did whatever was required of her, the plaintiff treating her as if she were at home, as her guardian.

Held, that the plaintiff could not recover, for that the right of action for the alleged wrong was not vested in the plaintiff, but in the person who was master of the girl at the time of her seduction. *McKersie v. McLean*, 428.

SEIZURE.

See MALICIOUSLY ISSUING EXECUTION.

SEPARATE ESTATE.

See HUSBAND AND WIFE.

SEQUESTRATION.

Appeal pending.]—*See* INJUNCTION.

SERVICE.

Supreme Court certificate.]—*See* REVIVOR.

See SEDUCTION.

SETTLEMENT.

Pressure.]—*See* STOCKHOLDER.

SHAREHOLDERS.

See STOCKHOLDERS

SHELLEY'S CASE.

See WILL, 3.

SHERIFF.

See INTERPLEADER—PARTNERSHIP, 2.

SHOPS.

See TAVERNS AND SHOPS.

SIGNATURE.

Omission—By-law.]—*See* WAYS, 2.

SINKING FUND.

See MUNICIPAL CORPORATIONS, 4.

SNOW.

Falling from roof of house—Liability.]—*See* MUNICIPAL CORPORATIONS, 2.

SOLICITOR.

See MALICIOUSLY ISSUING EXECUTION.

SPECIFIC PERFOR
See PATENT OF INVI

SPECIFIC PERFOR

*Contract—Improvider
ing—Costs.*]—The court
way very clearly before i
specific performance of
and it must be satisfied
tegrity and good faith o
seeking its special
Where incapacity and i
hand in hand, the Cour
to enforce a contract,
purchaser was guilty o
fault than making a ha
scientious bargain.

In this case, the pla
woman of the age of ei
for rescission of a con
sale of land, and the
way of cross-relief aske
performance. The evi
that at the time of c
was inequality betwe
in that the plaintiff wa
able to protect her ow
was the defendant to
that she had capricious
vidently rejected the
solicitor, who tried to
to accept an offer more
that she was illiterate
city (weak at best) w
her extreme age, by h
want of money, and h
the price offered by
was clearly inadequat
it did not appear that
was guilty of fraud,
ably the plaintiff did
prehend the terms of

Held, that under
stances, though no e
existed for interferin
sion of the Judge bel
ing the plaintiff's b

STATUTES, CONSTRUCTION OF

Legal and equitable debts—Priorities.—By the effect of the Judicature Act, the distinction between legal and equitable debts and legal and equitable remedies is abolished. *Bank of Toronto v. Hall*, 653.

- 3 Eliz. ch. 5.]—See CONTRACT, 1.
 3 Geo. IV. ch. 1. sec. 15.]—See BRIDGE.
 Imp. Act 14 & 15 Vic. ch. 99, secs. 7, 11.]—See PATENT OF INVENTION.
 C. S. C. ch. 66, sec. 5.]—See ARBITRATION AND AWARD, 1.
 C. S. U. C. ch. 73, sec. 16.]—See WILL, 9.
 35 Vic. ch. 26, D.]—See PATENT OF INVENTION.
 38 Vic. ch. 16, D.]—See BANKRUPTCY AND INSOLVENCY, 2.
 R. S. O. ch. 10, sec. 4.]—See PARLIAMENT.
 R. S. O. ch. 23.]—See PARLIAMENT.
 R. S. O. ch. 24.]—See PARLIAMENT.
 R. S. O. ch. 38, secs. 26, 27.]—See INJUNCTION.
 R. S. O. ch. 47, sec. 160.]—See MALICIOUSLY ISSUING EXECUTION.
 R. S. O. ch. 95, sec. 13.]—See BILLS OF SALE AND CHATTEL MORTGAGES.
 R. S. O. ch. 104.]—See MORTGAGE, 1.
 R. S. O. ch. 106, sec. 6.]—See WILL, 9.
 R. S. O. ch. 107, sec. 34.]—See BANKRUPTCY AND INSOLVENCY, 3.
 R. S. O. ch. 109.]—See WILL, 5.
 R. S. O. ch. 118.]—See BANKRUPTCY AND INSOLVENCY, 1—CONTRACT, 1.
 R. S. O. ch. 120.]—See MECHANICS' LIEN, 1.
 R. S. O. ch. 150.]—See BILLS OF LADING AND WAREHOUSE RECEIPTS.
 R. S. O. ch. 160, secs. 21, 22.]—See INSURANCE, 3, 4.
 R. S. O. ch. 162.]—See INSURANCE, 2.
 R. S. O. ch. 165, sec. 7.]—See ARBITRATION AND AWARD, 1.
 R. S. O. ch. 174, secs. 369, 373, 466, sub-sec. 51, 529.]—See MUNICIPAL CORPORATIONS, 3.
 R. S. O. ch. 174.]—See PRACTICE.
 R. S. O. ch. 180.]—See ASSESSMENT AND TAXES.
 R. S. O. ch. 180, sec. 88.]—See MUNICIPAL CORPORATIONS, 4.
 42 Vic. ch. 9, sec. 9, sub-sec. 17, D.]—See ARBITRATION AND AWARD, 2.
 43 Vic. ch. 22.]—See BILLS OF LADING AND WAREHOUSE RECEIPTS.

- 44 Vic. ch. 30, sec. 13, O.]—See PUBLIC SCHOOLS, 2.
 45 Vic. ch. 1, D.]—See BILLS OF EXCHANGE AND PROMISSORY NOTES.
 45 Vic. ch. 23, D.]—See CORPORATIONS, 1.
 45 Vic. ch. 26, sec. 17, O.]—See DRAINAGE.
 45 Vic. ch. 42, D.]—See HUSBAND AND WIFE, 2.
 46 Vic. ch. 9, O.]—See BANKRUPTCY AND INSOLVENCY, 3.
 46 Vic. ch. 18, secs. 359, 570, 589, O.]—See DRAINAGE—MUNICIPAL CORPORATIONS, 4.
 47 Vic. ch. 35, sec. 35, O.]—See TAV-ERNS AND SHOPS.
 O. J. Act, sec. 17, sub-sec. 10.]—See BANKRUPTCY AND INSOLVENCY, 4.
 O. J. Act, Rule 97.]—See HUSBAND AND WIFE, 3.
 O. J. Act, Rule 324.]—See JUDGMENT—PARTNERSHIP, 1.
 O. J. Act, Rule 428.]—See MORTGAGE, 2.
 Municipal Act, 1883, 46 Vic. ch. 18, secs. 570, 589.]—See DRAINAGE.

STOCKHOLDERS.

1. *Broker—Pledge of stock—Sale by p. gee—Custom of brokers—Settlement—Pressure—New trial.*—The plaintiff, a broker, pledged certain stock with the defendants, brokers, for advances, and it was agreed that the plaintiff might call for his stock or the defendants for their money on two days' notice. The defendants being in need of that stock immediately used it for the purpose of filling their own engagements. Subsequently the defendants alleged that the plaintiff was in default, and the plaintiff, not being aware that they had disposed of his stock, gave them his promissory notes for the amount claimed by the defendants. He subsequently discovered that they had sold the stock.

The defendants set up in defence to this action for the wrongful sale an alleged custom of brokers that upon stock being pledged to a broker

he might use it as his ready to return to the plaintiff called upon an equal shares of the same stock.

Held, that no such agreement was proved, nor would such an agreement be valid: that the parties agreed to be bound by such an agreement of dealing, but in this case no such agreement was proved.

Held, also, that the plaintiff might lawfully have resorted to the stock to enable them to pay the advances to the plaintiff, and that the plaintiff's sales and other disposition of the stock by the defendant was not in default, and that the plaintiff was not in default, and that the plaintiff was to recover from the defendant at which they sold the stock.

The jury found that the plaintiff's notes which resulted in the plaintiff's notes to the defendants were given to him with full knowledge, but under pressure, and on other findings a verdict was returned for the defendants. The court was of opinion that the plaintiff was entitled to a verdict on the finding, and that the verdict was against law and evidence. *Mara v. Mara*.

2. *Brokers—Agreement on margin—Failure to pay—Custom and usage.* The defendant assumed a contract with the plaintiff with on which F. was to and carry for the plaintiff of Federal Bank stock by plaintiff of a purchase money of the "margin," and the plaintiff keep up his margins in the value of the stock enable F. to carry the loan was also arranged.

certified copy of the by
inspector under section
2 of the Dominion Act
entitle the applicant to
aid of the Ontario Act i

Another provision
“ Every person receivin
cense shall confine the
his shop solely and ex
the keeping and selling
Held, that this was no
and in restraint of trade

It was also objected
of the License Act of 18
ch. 35, O., in effect repe
law as it made the dut
\$200, and the council i
mitted the question to
Held, that if repealed it
quashed ; but *semble*, th
of the section was to add
duty to the amount alre
for by the by-laws previ
unless the council saw fi
15th April, 1884, to an
law as to license duty p
under.

No seal was affixed to
but an impression of
made thereon : *Held*, st
Croome and Municipa
Brantford, 188.

TAXES.

See ASSESSMENT AND

TAX SALE

See SURRENDER

TELEGRAM

Contract contained in
TRACT, 2.

under the name of "B.'s new and improved head-line copy-book." G. now sought an injunction against the C. Co. and B., restraining them from infringing his trade mark, and from advertising their books in such a way as to lead the public to believe them to be his head line copy books.

Held, on the evidence that G. had not acquired the right to use the name "B," as a trade mark.

Held, however, that inasmuch as the defendant's book was calculated to deceive the public into believing that they were getting G.'s book, and the defendant's fraudulently and collusively intended that it should do so, G. was entitled to a perpetual injunction restraining them from advertising, or selling, or advertising for sale, the book, "B.'s new and improved head line copy book," in and with its present form and cover, or in and with any other form or cover calculated to deceive persons into the belief that it was G.'s book. *Gage v. Canada Publishing Co. et al.*, 68.

TREES.

Damages by felling—Remoteness.]

—See ARBITRATION AND AWARD.

TRESPASS.

See MALICIOUSLY ISSUING EXECUTION.

TOWNSHIPS.

Roads between.]—See WAYS, 2.

TRUSTS AND TRUSTEES.

Trust—Following trust moneys—Earmark—Assignee for creditors—

Holder for value.]—Where C. an insolvent, had assigned all his assets and stock in trade to S., as trustee for creditors, and the plaintiff claimed a specific lien on the same to the extent of certain trust moneys, which had come into C.'s hands, as trustee and executor for the plaintiff, under the will of his (the plaintiff's) father, but had been wrongfully converted by C. to his own use, and employed in his own business to pay his trading debts, but as to which there did not appear to be any identity or connection with the stock in trade assigned to S.

Held, that the plaintiff as against S., was only entitled to a dividend with the other creditors, on the full amount, with interest down to the time of assignment. *Culhane v. Stuart et al*, 97.

See CORPORATIONS, 3—ESTATE—PUBLIC SCHOOLS, 1—WILL, 1.

ULTRA VIRES.

See BILLS OF LADING AND WAREHOUSE RECEIPTS — TAVERNS AND SHOPS.

USAGE.

See STOCKHOLDERS.

VENDORS AND PURCHASERS ACT.

See WILL, 5.

VESSEL.

See CORPORATIONS, 3.



Per WILSON, O. J.—The defendants could legally acquire the road by purchase and make themselves responsible for the sale under a by-law properly passed for such purpose; and if the defendants are bound by their acts, and are precluded from denying their legal responsibility to maintain the road as a county road so long as they keep it, or if they can be made to perfect the original defective by-law, as to the latter of which propositions he expressed no opinion, they had by the by-law passed therefor, divested themselves of the road and terminated their liability.

Per ROSE, J.—If the defendants had power to purchase the road, and did purchase it, they had power to abandon it, and they had by their by-law exercised such power.

Quere, as to the jurisdiction of a local municipality over a road running within one or more townships, or through more than one township. *Regina v. Corporation of Perth*, 195.

WIFE.

See HUSBAND AND WIFE.

WILL.

1. *Construction — Possession by cestui que trust.*—The rule is that when property is devised to a trustee to pay the rents and profits to any person the *cestui que trust* is entitled to the possession; but where other parties have also a claim, it rests in the discretion of the Court whether the actual possession shall remain with the *cestui que trust* or the trustee.

J. O. by his will provided as follows: "4. Notwithstanding the di-

rections hereinbefore contained, I desire that if my son W. O. returns to Toronto within five years from the date of my death, my said executors shall hold in trust for him from the time of his return to Toronto said lots Nos. * * subject to the existing life estate of my said wife in a portion thereof, during the term of his natural life, and shall pay over to him all rents, issues, and profits thereof, and after his death shall divide the same between his children in such manner as he shall in his last will and testament direct, and in default of such direction and appointment to divide said property equally between them, conveying to each child his or her share when, if a son, he attains the age of 21 years, or a daughter attains the age of 21 years or marries, and in the meantime to apply the proceeds of the same to the support and maintenance of said children.

In an action by W. O. against the executors and trustees of the will, claiming the actual possession of the property of which he was entitled to the rents and profits, it was

Held, that he was not entitled to such possession, and his action was dismissed with costs.

Whiteside v. Miller, 14 Gr. 393, commented on and followed. *Orford v. Orford*, 6.

2. *Construction — Restraint on alienation.*—A testator, by his will, dated June 25th, 1866, devised to the plaintiff "and his heirs and executors for ever," a parcel of land, subject to the following proviso: "That he neither mortgage nor sell the place, but that it shall be to his children after his decease." The plaintiff had children living at the date of the will. The testator died in 1867.

only, the remaining lot thirty
wide on Jarvis Street, running
to Mutual Street, I bequeathed
daughter E. R. and that
not dispose of the same on
and testament, and if either
said daughters shall depart
without leaving issue, then
such case the survivor shall
be possessed of the share of the
sister." E. R. W. contracted
the property devised to her
purchaser objected to con-
purchase on the ground that
only a life estate in it. Or-
dination under the Vendors
charters Act, R. S. O., char-
was.

Held, that E. R. W. took
in fee simple, which was not
restricted by a condition ag-
stipation in any manner, ex-
testamentary, instrument
such restraint was valid.
Stanley, 315.

6. *Construction* — "E-
"Children."—A testator
1847 leaving a will, in which
devising his farm to his wife
and at her decease to be divided
his executors between his
and H. in certain proportions
continued: And in case of
both of my sisters F. and
previous to my decease, then
is, that each of their portions
to them respectively shall
executors divided between
each of their heirs, share
alike, that is each sister's
each sister's children, to their
heirs and assigns forever.

The testator's sister H. predeceased
him, leaving children, who predeceased
him, and having had also a
predeceased her, leaving a son.

Held, that H. H. took the
the devise to H., for it was

